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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 995

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

PIEDMONT AVIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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October Term, 1969

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

PIEDMONT AVIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Air Line Pilots Association, International respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled action on September 29, 1969.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit, dated September 29, 1969, is not yet officially reported. The opinion appears unofficially at 61 CCH Lab. Cas. ¶10,373 and 72 LRRM 2343. It is set forth at Appendix A. The order of the United States District Court for the Middle District of North Carolina, dated August 14, 1969, is not yet officially reported. The opinion appears unofficially at 60 CCH Lab. Cas. ¶10,318 and 71 LRRM 3216. It is set forth in Appendix B. The order of

Circuit Judge John D. Butzner, Jr., on the motion of petitioner for a stay of the District Court order, is set forth at Appendix C.

The order of the United States District Court for the District of Columbia, dated August 1, 1969, in companion litigation between the same parties, is set forth at Appendix D. The oral opinion of Judge Howard Corcoran preceding said order is set forth at Appendix E.

Jurisdiction

The judgment sought to be reviewed was dated and entered in the United States Court of Appeals for the Fourth Circuit on September 29, 1969, and is set forth at Appendix F. The jurisdiction of this Court to review that judgment by writ of certiorari is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Does federal labor law under the Norris-LaGuardia Act and Railway Labor Act permit a preliminary injunction against a peaceful strike, called after exhaustion of all Railway Labor Act "major dispute" collective bargaining procedures, to be issued in the absence of any express finding of a violation by the employee representative of the "major dispute" provisions of the Railway Labor Act?

2. Where a federal district court has denied a preliminary injunction against company self-help on the express ground that both parties have in good faith exhausted the "major dispute" procedures of the Railway Labor Act and are free to exercise economic self-help, and such litigation is still pending, may another federal district court in an action in-

volving the same parties and underlying events grant a preliminary injunction against a strike called in response to such company self-help?

3. Does Section 8 of the Norris-LaGuardia Act permit injunctive relief in a "major" Railway Labor Act dispute where a carrier seeks relief against a strike called in response to employer self-help, after the carrier has declined a proffer of voluntary arbitration made by the National Mediation Board under Section 5, First of the Railway Labor Act?

Statutory Provisions Involved

This case involves Sections 2, First; 2, Second; 5, First; and 6 of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The case also involves Sections 1, 2, 4, 7, 8 and 9 of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* The statutory provisions are set forth at Appendix G.

Summary of Railway Labor Act Provisions.

This Court recently described the collective bargaining framework established by the applicable provisions of the Railway Labor Act in *Bhd. of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), as follows:

> "III. The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'

The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a scheme which deliberately denies the final power to compel arbitration.' Florida E. C. R. Co. v. Railroad Trainmen, 336 F.2d 172, 181 (1964). We have consistently so held in a long line of decisions. Railway Clerks v. Florida E. C. R. Co., 384 U.S. 238, 244 (1966); Locomotive Engineers v. Baltimore & O. R. Co., 372 U.S. 284 (1963); Railroad Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330 (1960); Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711, 725 (1945).

Statement of the Case

Air Line Pilots Association, International ("ALPA") is the national pilot representing organization. ALPA has represented the pilots employed by Piedmont Aviation, Inc. ("Piedmont" or the "Company") and maintained collective bargaining agreements with Piedmont for many years.

This action was commenced by Piedmont to enjoin a pilot strike called in response to the Company's "self-help" removal of the Second Officer (third pilot) from the crew complement on Boeing 737 aircraft. Both the Company self-help and the pilot strike took place after exhaustion of all "major dispute" procedures of the Railway Labor Act ("RLA"). A preliminary injunction maintaining the three-pilot crew *status quo ante* before Company self-help and the pilot strike is now in effect.

The underlying subject matter of the dispute between the parties is the pilot crew complement for Piedmont Boeing 737 ("B-737") jet aircraft. Although the issues presented for review do not involve the actual merits of the crew complement controversy, as such, since crew complement is a mandatory subject for bargaining, some background regarding crew complement is necessary for an understanding of the case.

ALPA Safety Activity and Bargaining over FAA Minimum Standards.

ALPA has devoted substantial efforts to air safety matters for many years (Kozak, pp. 2-6).* Similarly, the pilots

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* The appeal herein was expedited with use of the original record. For this reason, references to affidavits and exhibits thereto are designated by the last name of the affiant.

always have maintained policies and a collective bargaining posture encompassing higher standards through agreement than the minimum requirements set by aircraft manufacturers, carriers, and the Federal Aviation Administration ("FAA"). David L. Cole, the nationally eminent arbitrator, has observed: "To a degree unique in American industry, the pilot and his organization have participated in planning and in making important decisions in the air line industry along with the managements of the airlines" (Kozak, pp. 4-5).

ALPA policies regarding jet aircraft have been implemented through collective bargaining for many years (Kozak, pp. 5-6). Crew complement itself has admittedly been a subject of mandatory bargaining on all airlines including Piedmont (Complaint, ¶ 5).

In 1966, the ALPA Board of Directors (consisting of pilot representatives from all airlines) revised pilot crew complement policy to provide for a three pilot crew on all jet aircraft certified thereafter (App. 1a, note 1).* There never has been any substantiated contention that this was based on other than safety considerations. The revised policy was adopted before 1967 FAA "minimum standards" certification of the B-737 for a two pilot crew.

United-ALPA Negotiations and Arbitration on B-737 Crew Complement.

In March of 1968, ALPA and United Air Lines ("United") entered into an agreement to commence B-737 service with a three pilot crew and also to provide for an extensive joint evaluation of two or three pilot crew comple-

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* References designated "App." are to the Appendices to this Petition.

ment followed by arbitration on the issue (Kozak, Ex. D). In a February 1969 decision based exclusively on safety considerations, a three member Special Review Board composed of Sylvester Garrett, Charles C. Killingsworth, and Arthur M. Ross found that the B-737 should have a three pilot crew for the duration of the existing United-ALPA agreement (Kozak, Ex. F).

Since the March 1968 United-ALPA agreement, ALPA has negotiated B-737 agreements with several other airlines. These agreements include a variety of provisions on crew complement, rates of pay, and crew duties (Kozak, pp. 14-16, Exs. G-K). Three of these airlines are regional carriers like Piedmont. All are operating the B-737 with three pilots.

1967-1968 Piedmont-ALPA Negotiations and Agreement.

The 1967-1968 negotiations and mediation involved all issues concerning a renewed pilot agreement. The B-737 was one of the issues. The July 24, 1968 collective bargaining agreement and B-737 agreement were a result of lengthy bargaining and mediation sessions (Shipton, pp. 2-11).

On the B-737 issue, negotiations commenced with the pilots proposing a three pilot crew and the Company arguing for a two pilot crew (Shipton, pp. 2-3). The agreement represented compromise by both parties.

Under the agreement, B-737 aircraft would enter service with a three pilot crew at specified pay. If the aforesaid United-ALPA procedures resulted in a two pilot crew, Piedmont would immediately start two pilot operations at determined rates of pay. If the United-ALPA procedures re-

sulted in a three-pilot crew, Piedmont and ALPA would reopen negotiations "for three-man operations and rates of pay beginning January 1, 1969" (Shipton, pp. 6-7).

1969 Negotiations and Mediation—Case No. A-8572.

After the United decision, Piedmont and ALPA reopened negotiations in March 1969 (Koontz, p. 2). There was dispute as to whether the parties had agreed in their 1968 contract to be bound by a three pilot decision on United and to reopen negotiations on the nature of continued three pilot operations and rates of pay (as the pilots maintained) or had agreed to reopen completely on crew complement and rates of pay after a United three pilot decision (as Piedmont maintained) (Koontz, pp. 2-3).

Piedmont and ALPA then proceeded to "major dispute" mediation under RLA Section 5. The matter was designated Case No. A-8572. No agreement was reached (Koontz, pp. 3-4).

Piedmont Rejects Arbitration Proffer—Mediation Board Terminates Services—Piedmont Announces Self-Help Program.

On June 6, 1969, the Mediation Board proffered "major dispute" arbitration under the RLA in Case No. A-8572 (Koontz, Ex. B). Piedmont immediately rejected the arbitration proffer, stating "we do not feel that arbitration procedures, although they have been tried elsewhere, have resulted in a satisfactory settlement of the issues involved in this case" (Koontz, Ex. C).

Upon receiving Piedmont's letter, the Mediation Board, on June 13, terminated its services under RLA Section 5, First, advising the parties of their obligation to maintain

the *status quo* for a 30 day cooling-off period and also stating:

> "It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.
>
> In these circumstances, notice is hereby served in behalf of the Board that its services . . . have this day been terminated under the provisions of the Railway Labor Act." (Koontz, Ex. D).

By telegram of June 16, the Company advised ALPA that it would embark on a self-help program by removing the B-737 Second Officer (third pilot) from active service 30 days later, on July 16.

District of Columbia Litigation and Decision.

Based upon the pilots' position that Piedmont had agreed to abide by the United decision, ALPA sought a preliminary injunction in the District of Columbia against removal of the Second Officer. Piedmont filed a counterclaim and affidavits, substantially similar to the claims here except for events since that filing (Savelson, Exs. B and D). That litigation involves the same issues and is based on the same events as this case.

District Judge Corcoran, denying ALPA a preliminary injunction, issued an oral decision that the parties had exhausted RLA procedures, invoking the Norris-LaGuardia Act as precluding injunctive relief under these circumstances (App. E). Thereafter, he entered an order including express findings of fact and conclusions of law that:

> "2. The parties have, under the provisions of the Railway Labor Act, engaged in good faith negoti-

ations and mediation in Case No. A-8572, without reaching an agreement, following which the National Mediation Board has terminated its services under Section 5, First, of the Act.

3. Under the provisions of the Railway Labor Act, the parties to a labor dispute are free, following expiration of 30 days after termination of services under Section 5, First, by the National Mediation Board, to resort to self-help by economic action of either or both parties. *Bh'd of Railroad Trainmen* v. *Jacksonville Terminal Co.*, — U.S. —, 89 S. Ct. 1109 (1969)." (App. 6d-7d).

Piedmont Starts Self-Help—Pilots Respond with Strike.

On July 21, Piedmont started self-help by locking the B-737 Second Officer off the aircraft and attempting two pilot operations. It was at this point that the pilots struck the airline. With both parties engaged in self-help, there was no comment from Piedmont that the pilot strike was in any way unlawful (Kozak, pp. 20-21).

On July 28, Piedmont notified ALPA that it did not plan to resume B-737 jet service "at this time" and requested that the pilots return to work on propeller aircraft. At a meeting with the Company on August 1, held under the auspices of the National Mediation Board, a variety of pilot proposals on all open issues was rejected. It also became readily apparent at the meeting that the July 28 letter was a sham to induce the pilots to return to work without agreement on open issues and that Piedmont had no intention whatsoever of operating the airline without B-737 jet service. The lockout and strike continued unresolved (Koch, pp. 2-10).

Present Litigation Commenced in North Carolina.

Four days later, on August 5, Piedmont commenced the present action in North Carolina, ignoring the pending District of Columbia litigation and decision. Piedmont's complaint invoked federal court jurisdiction under 28 U.S.C. §§ 1331 and 1337. The Company, asserting that ALPA had not bargained in good faith regarding the B-737 crew complement and alleging curtailment of operations to eliminate B-737 service, sought a preliminary injunction returning the pilots to work on propeller equipment only. On August 8, Piedmont moved to amend its complaint, seeking a total injunction against any pilot self-help and wholesale return to work of its pilots.

District Court Proceedings.

In the District Court, ALPA first moved for transfer of the case to the District of Columbia under 28 U.S.C. § 1404(a) and § 1651. ALPA alternatively sought a stay of proceedings until determination of the D. C. litigation. This motion was denied on August 13.

On August 14, District Judge Gordon issued an injunction prohibiting any pilot strike or other self-help (App. B). The order did not require Piedmont to restore pre-strike B-737 terms of employment, thus leaving the Company free to dictate unilaterally the conditions for its B-737 pilots. The order did not include any findings or conclusions of violations of the Railway Labor Act or failure to bargain in good faith by ALPA, despite such contentions by Piedmont. The only basis cited for injunctive relief was "a substantial question of law and fact," in the following language:

> "2. Defendant's call of a strike terminating all the air service of the plaintiff, inclusive of propeller

aircraft, raises a substantial question of law and fact for decision in view of the collective bargaining agreement of July 24, 1968, and the mandatory policy of the defendant as to crew complement." (App. 4b).

A motion for a stay, initially denied, was thereafter granted.

Proceedings Before the Fourth Circuit.

On August 15, Circuit Judge Butzner heard argument on ALPA's motion for a stay pending appeal. Judge Butzner modified the District Court order by adding as a condition of injunctive relief that Piedmont restore the *status quo ante* of July 20, 1969, including B-737 three pilot crew complement and pay (App. C).

In its decision on ALPA's appeal, the Fourth Circuit affirmed the District Court injunction, as previously modified by Judge Butzner, "to maintain conditions that existed before the strike . . ." (App. 1a).

Reasons for Granting the Writ

This case presents for review important questions under both the Railway Labor Act and the Norris-LaGuardia Act. The entry of a preliminary injunction order to prevent employee self-help in response to a company lockout of pilots, after exhaustion of all RLA "major dispute" procedures and after the company has declined an arbitration proffer by the National Mediation Board, raises important issues regarding accommodation of the Railway Labor Act with the Norris-LaGuardia Act. The case also involves important principles of comity between federal courts in actions involving the same parties, issues, and underlying events.

The Fourth Circuit decision is inconsistent with principles enunciated by this Court in *Order of Railroad Tele-*

graphers v. *Chicago & North Western Ry. Co.*, 362 U.S. 330 (1960), *Bhd. of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co.*, U.S. 30 (1957), and *Bhd. of Railroad Trainmen* v. *Toledo, Peoria and Western R.R.*, 321 U.S. 50 (1944). Furthermore, the decisions below are in direct conflict with the decisions of the Second Circuit in *Chicago, Rock Island & Pacific R.R. Co.* v. *Switchmen's Union*, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962), and *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n*, 306 F.2d 840 (2d Cir. 1962); the decision of the Third Circuit in *Crosley Corp.* v. *Hazeltine Corp.*, 122 F.2d 925 (3rd Cir. 1941), *cert. denied*, 315 U.S. 813 (1942); the decision of the Fifth Circuit in *Bhd. of Locomotive Firemen & Enginemen* v. *Central of Georgia Ry. Co.*, — F.2d — (5th Cir. 1969), 60 CCH Lab. Cas. ¶10,075; and the decision of the District of Columbia Circuit in *Hilton Hotels Corp.* v. *Weaver*, 325 F.2d 1010 (D.C. Cir. 1963) (per curiam), *cert. denied*, 376 U.S. 951 (1964).

QUESTION I

Does federal labor law under the Norris-LaGuardia Act and Railway Labor Act permit a preliminary injunction against a peaceful strike, called after exhaustion of all Railway Labor Act "major dispute" collective bargaining procedures, to be issued in the absence of any express finding of a violation by the employee representative of the "major dispute" provisions of the Railway Labor Act?

The temporary injunction in this case compelled termination of a pilot strike which was called only (1) after exhaustion in Case No. A-8572 of all RLA "major dispute" procedures; (2) after a District of Columbia Court found that the parties had bargained in good faith and were free for

self-help (App. D); and (3) in response to a Company lockout of B-737 Second Officers.

The injunction order here in question, issued by the North Carolina District Court, does not include any findings or conclusions that ALPA violated the Railway Labor Act. There is no finding of clear and convincing evidence of unlawful conduct. The only basis asserted for injunctive relief is "a substantial question of law and fact" (App. 4b).*

With respect to negotiations in Case No. A-8572 which preceded self-help by both parties, the North Carolina District Court injunction order does not find that ALPA refused to bargain with Piedmont over crew complement, or that ALPA policy interferred with good faith bargaining. The order, while couched in vague terms, does not accept Piedmont's contention that the pilots would not bargain over crew complement because of ALPA crew complement policy.**

Upon review of the District Court's order, the Fourth Circuit did not vacate the injunction, but instead construed the various "findings and conclusions as a ruling that the Union failed to negotiate in good faith as required by the Railway Labor Act" (App. 5a). This appears to be manufactured out of whole cloth, based on no perceptible texture of fact.

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* One would suppose that substantial questions of law and fact would preclude rather than support drastic injunctive intervention by the court.

** A comparison of the North Carolina injunction order (App. B) with the District of Columbia Court order (App. D) demonstrates that the findings of the D.C. Court are far more specific on the exhaustion of RLA "major dispute" procedures. For example, compare North Carolina findings 8-10 on events in bargaining (App. 2b) to D.C. findings 5 through 13 on the same subject (App. 2d-6d); and compare North Carolina conclusions 2-3 (App. 4b) to D.C. conclusions 2-3 (App. 6d-7d).

Section 1 of the Norris-LaGuardia Act (App. 3g) declares that the federal courts are deprived of jurisdiction to issue injunctions in labor disputes "except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act." Section 2 of Norris-LaGuardia (App. 3g-4g) declares "the public policy of the United States" to be in favor of collective bargaining, as opposed to restraints on concerted activity by employees. Section 4 (App. 4g-5g) flatly prohibits certain types of injunctions, among which are orders against "Ceasing or refusing to perform any work or to remain in any relation of employment." Section 7 (App. 5g-7g) imposes further limitations against labor injunctions, including the requirement of "findings of fact by the court, to the effect—(a) That unlawful acts have been threatened and will be committed unless restrained. . . ." (App. G).

This Court has previously held that the prohibitions against labor injunctions embodied in Norris-LaGuardia must be read together or accommodated with the collective bargaining procedures of the RLA "so that the obvious purpose in the enactment of each is preserved." *Bhd. of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co., supra* at 40 (1957). In RLA "major disputes," injunctions are issued for only one purpose: to effectuate and preserve adherence by the parties to the collective bargaining process established by Congress. *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U.S. 330, 338-339 (1960); *American Airlines, Inc.* v. *ALPA*, 169 F. Supp. 777 (S.D.N.Y. 1958). This Court recently has confirmed the right of employees to self-help without judicial interference after exhausting RLA bargaining procedures. *Bhd. of Railroad Trainmen* v. *Jacksonville Terminal Co., supra.*

In this case, Piedmont sought to avoid the Norris-La-Guardia prohibitions on injunctive relief by arguing that, while the "major dispute" procedures of the RLA had been exhausted, ALPA had not bargained in good faith on B-737 crew complement and had thereby not lawfully exhausted the RLA procedures. Therefore, said Piedmont, injunctive relief which would normally be appropriate where a party seeks to engage in self-help prior to the exhaustion of RLA "major dispute" procedures was proper herein. This argument of the Company was, of course, directly contrary to the explicit provisions of the District of Columbia order (App. D).* However, even placing the D. C. order aside, the fact is that the North Carolina District Court did not accept Piedmont's contentions and did not issue any findings or conclusions that ALPA failed to bargain in good faith or acted in violation of the RLA.

This basic defect in the District Court order cannot be remedied by merely construing the order as including a ruling of failure to bargain in good faith, as was done by the Fourth Circuit** (App. 5a). It has long been well estab-

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* The record shows that this type of argument was made by ALPA in the D.C. litigation, where the pilots contended that Piedmont could not take self-help to lock out B-737 Second Officers, and was countered by the Company which successfully maintained that all RLA procedures had been fully exhausted on the crew complement issue (Savelson, Ex. D; App. 5d-7d).

** ALPA continuously has maintained that it bargained in good faith on B-737 crew complement at all times. The record includes detailed statements by ALPA negotiators on negotiations leading to the 1968 agreement and in Case No. A-8572 during 1969 (Shipton, Koontz & Koch affidavits). It is established law, as recognized by the Fourth Circuit, that ALPA crew complement policy implemented through bargaining is entirely lawful. *Cutler* v. *NLRB*, 395 F.2d 287 (2d Cir. 1968). It is likewise settled law that there is no obligation on a party to yield from its original position on a mandatory subject of collective bargaining.

lished that the Norris-LaGuardia Act requires injunctions to be supported by specific findings that such relief is necessary to prevent clear violations of established labor law. See, for example, *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323 (1938).

In this respect, the Fourth Circuit decision is plainly in conflict with *Chicago, Rock Island & Pacific R.R. Co.* v. *Switchmen's Union, supra,* where the Second Circuit vacated a temporary injunction issued against a strike after exhaustion of RLA procedures. There, the District Court had expressly found both lack of good faith efforts by the union to reach agreement and " 'serious, substantial, difficult and doubtful questions' " on whether the union had met its bargaining obligations. 292 F.2d at 62.

In *Switchmen's Union,* as here, the carrier argued violations of the RLA by reason of interference with good faith bargaining because of certain restrictions imposed by the union's constitution. Judge Friendly, in an exhaustive analysis of the relationship between Norris-LaGuardia and the RLA, held that Sections 4 and 7 of Norris-LaGuardia confined jurisdiction to issue injunctions "to a clear case of union failure to comply with obligations under the Railway Labor Act, and the record affords no warrant for finding that in the instant case." 292 F.2d at 67.

NLRB v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB* v. *Davison,* 318 F.2d 550, 554 (4th Cir. 1963). See also *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n, supra,* rejecting a bad faith bargaining charge where flight engineers demanded crew complement requirements above FAA regulations and refused to concede on their initial position throughout the bargaining process.

The Second Circuit also recognized the strict standards imposed by Section 4 of the Norris-LaGuardia Act, stating:

> "That section uses the most emphatic words possible —'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent. (Footnotes omitted). 292 F.2d at 71.

The Fourth Circuit decision is also in conflict with the Second Circuit opinion in *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n, supra.* There, the Court rejected a bad faith charge and vacated injunctive relief against a flight engineer strike where there was no concession by the union on its initial crew complement demand. Reaffirming *Switchmen's Union, supra,* the Second Circuit stated in part:

> "In the present case the only evidence advanced of failure to exert every reasonable effort is insistence, in response to Pan American's proposals as to crew complement, on the requirement of the 'A and P license' for flight engineers. There is no claim that the Union has not met with the employer whenever requested to do so over the many months of negotiation nor that the Union has not, apart from its insistence on this one item, participated in the give and

take of these negotiations in complete good faith." 306 F.2d at 849.

* * * * *

"Pan American's single example of lack of reasonable effort to reach agreement appears, on examination, to be a completely lawful claim of the Union based upon an unexceptionable motive or purpose. It certainly falls far short of 'overcoming that bar' to which we referred in the Chicago, R. I. & P. R.R. case, supra." 306 F.2d at 849.

The Fourth Circuit decision thus departs from the established principle that injunctions may not be issued except upon adoption of specific findings by the court of RLA violations which are based on clear and convincing evidence. The only basis cited for injunctive relief here, "a substantial question of law and fact," was insufficient in *Switchmen's Union* when expressed in stronger language and accompanied by additional findings. The departure from precedent and conflict between the circuits presented by the Fourth Circuit decision affects rights of all RLA employees and should be resolved by this Court.

The obligation of the Fourth Circuit to direct issuance of injunctive relief only upon clear evidence and specific findings of unlawful conduct could not be avoided by limiting its inquiry to whether the District Court abused its discretion in granting a preliminary injunction (App. 5a). The Court of Appeals has a further obligation, not discharged here, to assure that the purposes of the RLA and Norris-LaGuardia are preserved when a District Court attempts to accommodate the two Acts through injunctive relief.

The requirement for the Court of Appeals to examine the merits as part of the accommodation process is particularly

important in a labor injunction case. Even temporary injunctions have such a devastating effect upon the rights of employees that this Court has stated, in the context of National Labor Relations Act rights:

> "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board." *Local No. 438, Constr. & Gen. Laborers* v. *Curry,* 371 U.S. 542, 550 (1963).

In *McLeod* v. *Business Mach. & Office Appliance Mechanics Conf. Bd.,* 300 F.2d 237 (2d Cir. 1962), the Second Circuit described the prohibitions of the Norris-LaGuardia Act as follows:

> "Passed in 1932, that statute was a manifestation of strong congressional disapproval of the performance of federal courts in labor disputes. It was believed the temporary restraining order and preliminary injunction were inappropriate remedies for such use because they often settled the dispute under the guise of merely preserving the status quo." (Footnotes omitted). 300 F.2d at 239-240.
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> * * * * *
>
> "The preliminary injunction is of critical importance to participants in labor disputes, for it may have as great an effect upon the dispute as the ultimate outcome of the litigation." (Footnote omitted). 300 F.2d at 242.

If an injunction against a strike can be sustained, despite the absence of any findings or conclusions of RLA violations, then the prohibitions of the Norris-LaGuardia Act

have been emasculated for RLA employees. The mere introduction of evidence against the Union, rather than the actual findings of the Court, then become the standard for injunctive relief. It is of vital importance that this Court establish a uniform national standard on this subject which is consistent with basic principles of federal labor law.

QUESTION II

Where a federal district court has denied a preliminary injunction against company self-help on the express ground that both parties have in good faith exhausted the "major dispute" procedures of the Railway Labor Act and are free to exercise economic self-help, and such litigation is still pending, may another federal district court in an action involving the same parties and underlying events grant a preliminary injunction against a strike called in response to such company self-help?

This action seeks a decision on the same events—negotiations in Case No. A-8572—which are central to the prior litigation pending between the same parties in the District of Columbia. Indeed, assertions made by Piedmont in pleadings and affidavits are substantially similar in both actions (Savelson, Exs. D-9, D-10).

In his oral opinion denying ALPA a preliminary injunction (App. E), Judge Corcoran held that the parties had exhausted RLA procedures and invoked the provisions of the Norris-LaGuardia Act against injunctive relief. Thereafter, the Court entered specific findings and conclusions which are conclusive on the issues presented in this case: (1) good faith bargaining and (2) the right of both parties to engage in economic self-help (App. 6d-7d).

The District of Columbia order, of course, also precluded any injunctive relief to Piedmont regarding B-737 crew complement. Thus, when Piedmont became disappointed with the results of its self-help program, the Company adopted the tactic of starting a new action in North Carolina, without mention of the D. C. litigation. The fact that the same events and issues were involved was precisely the reason why ALPA moved at the first opportunity to transfer this litigation to the District of Columbia.

Regardless of transfer, however, there is plainly no way preliminary injunctive relief could be granted to Piedmont in the North Carolina District Court without an order running directly contrary to the findings and conclusions of the D. C. Court. Thus, the issuance of the injunction order presents a conflict between the decisions of two federal courts in litigation between the same parties on the same issues.

The question presented by these conflicting orders is of particular importance to pilots and other RLA employees, whose employment by its very nature involves contact with a multitude of states. It is nothing less than ridiculous that RLA collective bargaining be subject to different decisions on the same events in the different states encompassed by airline operations. This Court has previously recognized the absurdity of attempting to deal with airline bargaining relationships by application of state law. *Int'l Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 691 (1963). The basic reasoning of *Central Airlines* is equally applicable to this case, where the pilots actually face two conflicting federal court orders as a result of litigation in different district courts.

Had the D. C. Court order been a final decision, the doctrine of *res judicata* would obviously be applicable. No less should be the case on two preliminary injunction motions involving the same parties and same events. There would be complete chaos in the federal judicial system if a party were free to disregard the decision of one federal court and successfully maintain litigation based upon a directly contrary premise in a sister federal court. Indeed, this Court has long recognized that the simultaneous prosecution in two different courts of concurrent jurisdiction of cases relating to the same parties and issues leads to wastefulness of time, energy and money. *Smith* v. *McIver,* 9 Wheat. 532, 535, (1824); *Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19 (1960). For purposes of preliminary injunctive relief based upon exhaustion of RLA procedures, good faith bargaining, and the right to self-help, the D. C. decision is the "law of the case" and should be so recognized.

Failure of the Fourth Circuit either to mandate transfer of the case or to recognize the D. C. Court order as conclusive is also inconsistent with principles established by other circuits for handling two or more cases involving the same parties, issues, and events. In the broadest sense, Judge Maris, speaking for the Third Circuit in *Crosley Corp.* v. *Hazeltine Corp., supra,* recognized the inherent danger involved in such cases:

> "It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals." 122 F.2d at 930.

In *Hilton Hotels Corp.* v. *Weaver, supra,* the District of Columbia Court of Appeals was faced with a case which

raised issues of fact and law virtually identical to those which had been previously considered by the Third Circuit. The parties before the D. C. Court were "substantially the same as those before the Third Circuit." The D. C. Court stated:

> "We are satisfied that in the interests of comity and the orderly administration of justice[1] we should not attempt to reexamine the matters considered and resolved by the Third Circuit, a court having authority equal to our own."

"[1] . . . We decide only that where a prior decision against the plaintiff on the same issues he raises in the instant case would necessarily be frustrated or obstructed by a present decision in the plaintiff's favor this court will not interfere with the prior decision adverse to the plaintiff." 325 F.2d at 1010.

Most recently, in *Bhd. of Locomotive Firemen & Enginemen* v. *Central of Georgia Ry. Co.*, — F2d. — (5th Cir. 1969), 60 CCH Lab. Cas. ¶ 10,075, the Fifth Circuit, faced with a situation where two railroads sought injunctive relief against a threatened strike by a railway union in the face of *pending injunctive relief* litigation between the same parties on the same issues in another circuit, vacated a Georgia District Court order and ordered the case transferred to the District of Columbia. In vacating the duplicate Georgia restraining order and mandating transfer, Chief Judge Brown emphasized the binding effect of issue determination in the pending District of Columbia litigation:

> ". . . we get this case out of Georgia, where it never should have been, by sending whatever remains of the case to the D. C. District Court. Second, both Georgia Central and Southern were and are formal parties to the D. C. litigation. Each is irretrievably bound as to every issue determined by that Court

and the Court of Appeals for the District of Columbia." ¶ 10,075 at 16,261-16,262.

There is no reason why airline pilots or other RLA employees should be subject to one set of rules when they seek injunctive relief and a different set of rules when the carrier seeks injunctive relief. It is particularly disturbing, moreover, that inconsistent action of this type is taken despite a timely motion to transfer the second litigation to the court of first jurisdiction. This case requires this Court to resolve the conflict between the circuits and to establish that federal labor law will be uniform and equally applicable to both sides in RLA litigation.

QUESTION III

Does Section 8 of the Norris-LaGuardia Act permit injunctive relief in a "major" Railway Labor Act dispute where a carrier seeks relief against a strike called in response to employer self-help, after the carrier has declined a proffer of voluntary arbitration made by the National Mediation Board under Section 5, First of the Railway Labor Act?

Piedmont Rejection of Arbitration Proffer.

On Friday, June 6, 1969, the Mediation Board proffered arbitration (Koontz, Ex. B) in accordance with the requirement of RLA Section 5, First that the Board urge parties to submit major disputes to voluntary arbitration when mediation is unsuccessful. Piedmont rejected the proffer upon its receipt, stating as its sole reason "we do not feel that arbitration procedures, although they have been tried elsewhere, have resulted in a satisfactory settlement of issues involved in this case" (Koontz, Ex. C). The Board then terminated its services (Koontz, Ex. D).

Piedmont clearly set forth its reason for rejecting arbitration in terms of arbitration not having achieved a result "satisfactory" to the Company where used elsewhere, i.e., on United Air Lines. There was no assertion by Piedmont that arbitration was declined because the pilots had not bargained in good faith.

Section 8 of the Norris-LaGuardia Act Precludes Injunctive Relief on Behalf of Piedmont.

Section 8 of the Norris-LaGuardia Act provides as follows:

> "Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or *voluntary arbitration.*" (Emphasis added). 29 U.S.C. § 108.

In *Bhd. of Railroad Trainmen* v. *Toledo, Peoria and Western R.R., supra,* this Court held that Section 8 prohibits injunctive relief of any kind on behalf of a complainant who has declined an arbitration proffer. The Court stated:

> "The question, broadly stated, is whether respondent made 'every reasonable effort' to settle the dispute, as the section requires. On the facts this narrows to whether its steadfast refusal to agree to arbitration under the Railway Labor Act's provisions made the section operative. We think it did, with the consequence that the federal courts were deprived of the power to afford injunctive relief and respondent was remitted to other forms of legal remedy which

remained available." (Footnote omitted). 321 U.S. at 56.

* * * * *

"Section 8 demands this method be exhausted before a complainant to whom it is available may have injunctive relief. Broadly, the section imposes two conditions. If a complainant has failed (1) to comply with any obligation imposed by law or (2) to make every reasonable effort to settle the dispute, he is forbidden relief. The latter condition is broader than the former. One must not only discharge his legal obligations. He must also go beyond them and make all reasonable effort, at the least by the methods specified if they are available, though none may involve complying with any legal duty. Any other view would make the second condition wholly redundant. It clearly is not the section's purpose, therefore, by that condition, to require only what one is compelled by law to do." 321 U.S. at 56-57.

The *Toledo* opinion deals with virtually every argument which could be raised regarding application of Section 8 to RLA disputes. The carrier sought only an injunction against violence. Despite this, the Court stated that acceptance of the proffer for voluntary arbitration could have "averted the strike, the violence which followed, and the need for an injunction." 321 U.S. at 56. The Court pointed out that the railroad was limited to other remedies. The prohibitions of Section 8 were so categorical that the Court expressly denied injunctive relief even though it also found that Norris-LaGuardia was not generally intended to interfere with restraint of violence:

"The purpose of the section [8] is to head off strikes and the violence which too often accompanies them, by requiring the statutory steps to be taken before

> the aid of federal courts is sought in equity. Denial of that assistance is the sanction the statute affords to secure performance of the prescribed preventive measures. To give it, when they have not been taken, not only violates the section's terms. It defeats the purposes they were to accomplish and which, when achieved, make unnecessary invocation of the court's aid." 321 U.S. at 65.

The Fourth Circuit offers two grounds for distinguishing *Toledo*: (1) the good faith bargaining issue, which was not present in *Toledo,* and (2) acceptance by the union in *Toledo* of arbitration, whereas ALPA did not accept arbitration here (App. 8a-9a).

The fictitious good faith issue raised in this case cannot be a basis for erosion of the *Toledo* doctrine. Piedmont rejected the arbitration proffer for a single clearly stated reason: dissatisfaction with the result of the United proceedings. The Company did not even mention bargaining in good faith. It was only when Piedmont became disappointed with the results of self-help combat that it sought injunctive relief. This is far different from a situation where a party might have charged lack of good faith bargaining prior to the arbitration proffer and at least colorably have refused the proffer for that reason.

The fact that ALPA did not accept arbitration, while the union in *Toledo* did is a meaningless distinction. Here, Piedmont flatly rejected the arbitration proffer dated Friday, June 6 by letter of June 9 before ALPA even had an opportunity to respond. Since voluntary arbitration requires agreement of both parties, any subsequent action by ALPA would have been an exercise in futility. This is radically different from union rejection of an arbitration proffer.* Citation by the Fourth Circuit of *Bhd. of Railway & Steamship Clerks* v. *Florida East Coast Ry. Co.,* 384 U.S. 238, 247 note 8 (1966), does not clarify this point.

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* Paradoxically, the ALPA is damned for what it did not do, while the carrier is excused for what it did do.

The *Toledo* doctrine has been recognized for twenty-five years. It stands, in cases such as the present action, as a bulwark against injunctive relief on behalf of carriers who desire a self-help route and then, disappointed with the results, resort to injunction litigation. Rejection of the principles set forth in *Toledo* undermines the overall policy of Norris-LaGuardia to encourage use of the non-judicial processes of negotiation, mediation, and arbitration for the adjustment of labor disputes, and raises the specter of unrestricted use of the injunctive power as a strikebreaking weapon. If change by judicial intervention is to be made in the *Toledo* doctrine which this Court developed decades ago, it should be made by the Supreme Court and no other.

CONCLUSION

The issues presented by this case involve important questions of federal law and national labor relations policy which are fundamental to any accommodation of the Railway Labor Act with the Norris-LaGuardia Act. At stake are the rights not only of the pilots of Piedmont but of all RLA employees. For these and for the foregoing reasons, it is respectfully urged that the Supreme Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

(Opinion of the United States Court of Appeals for the Fourth Circuit, Dated September 29, 1969)

Before:

WINTER, CRAVEN, and BUTZNER, *Circuit Judges.*

BUTZNER, *Circuit Judge*:

Against a background of charges and countercharges that each side had failed to utilize the conciliatory procedures of the Railway Labor Act, the district court, on motion of Piedmont Aviation, Inc., granted an interlocutory injunction restraining its pilots from continuing a strike. With modifications to the order which are designed to maintain conditions that existed before the strike, we affirm the district court.

The airline and the union representing the pilots, Air Line Pilots Association, International, executed a collective bargaining agreement on July 24, 1968 that settled all terms and conditions of employment except the size of the crew flying Boeing 737 jets. The union, trying to implement a bylaw it adopted in 1966, insisted on three-man crews.[1] The company resisted, relying upon the Federal Aviation Administration's 1967 certification of the B-737 for operation by two-man crews.

After a number of fruitless bargaining sessions, the parties agreed to operate with three-man crews pending arbitration of a similar controversy with United Airlines. When the results of this arbitration failed to resolve the impasse at Piedmont, the parties continued three-man operation and reopened

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1 The bylaw provided in part: "All future turbine-powered transport aircraft certificated after the adoption of this policy . . . will be manned by a minimum crew of three pilots. . . ." The union's board of directors, by two-thirds vote, can exempt an aircraft from this policy.

bargaining negotiations. Again the parties failed to reach agreement, and mediation was unsuccessful. Finally, on June 6, 1969, the National Mediation Board proffered arbitration. The company refused, and the union did not respond.

The company then announced that it would fly the B-737 with two-man crews, and the union sought, but was denied, an interlocutory injunction against this in the United States District Court for the District of Columbia.[2] When the company attempted to operate with two pilots on July 21, 1969, the union struck, and two weeks later the company applied for an interlocutory injunction against the strike. Both parites claim they are engaged in a major dispute under the Railway Labor Act.[3] The company, seeking to avoid application of the Norris-LaGuardia Act, contends that the union violated the Railway Labor Act by failing to bargain in good faith. The union, in addition to denying this allegation, asserts that the company's refusal to arbitrate bars relief. The district court granted a preliminary injunction against the strike; we denied a stay and accelerated this interlocutory appeal.

The parties recognize that they are subject to the Railway Labor Act. 45 U.S.C. §§ 181 and 182. The heart of this Act, as Mr. Justice Harlan observed in *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969), is the duty imposed upon labor and management to exert every reasonable effort to make collective bargaining

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2 Ruby v. Piedmont Aviation, Inc., No. 1820-69 (D. D.C. Aug. 1, 1969).

3 Major disputes under the Railway Labor Act arise over the formation or change of collective bargaining agreements. Minor disputes relate to the meaning or proper application of existing agreements. See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723 (1945).

agreements and to settle their disputes so commerce will not be interrupted. 45 U.S.C. § 152, First. The Act calls upon the parties to decide their disputes, if possible, by negotiations. 45 U.S.C. § 152, Second. If the parties' conferences fail to solve their differences, the Act prescribes mediation, and if this is unsuccessful, the mediator must endeavor to induce the parties to submit their controversy to voluntary arbitration. 45 U.S.C. § 155, First.[4] Until the procedures required by the Act have been met, neither party can unilaterally change the working conditions or practices in effect prior to the time the dispute arose. 45 U.S.C. §§ 152, Seventh; 155, First; and 156.

The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115,[5] denies a federal court jurisdiction to enjoin a peaceful strike. We conclude, however, that the Norris-LaGuardia Act does not bar an interlocutory injunction in this case. In *Brotherhood*

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4 Provision is also made for further proceedings not applicable to this case. 45 U.S.C. § 160.

5 Section 4 of the Norris-LaGuardia Act [29 U.S.C. § 104] provides in part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

. . .

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified. . . ."

of R.R. Trainmen v. *Chicago R. & I. R.R.*, 353 U.S. 30 (1957), the Court found that the purposes of the Norris-LaGuardia Act and the Railway Labor Act were reconcilable, and it held that there must be an accommodation of the Acts so that the purpose of each is preserved. There the Court sanctioned an injunction against a strike over a minor dispute that was pending before the National Railroad Adjustment Board. Although the Railway Labor Act makes no provision for submission of major disputes to the Adjustment Board, the principles underlying the case are applicable here. Whether the dispute be major or minor, the Act requires the parties to confer and negotiate in good faith. Restraining the parties from self-help, through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays this right until the union satisfies the mandate of the Railway Labor Act.[6] *Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), which denied

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6 *Accord*, Brotherhood of R.R. Trainmen v. Akron & B.B. R.R., 385 F.2d 581, 613 (D.C. Cir.), *cert. denied*, 390 U.S. 923 (1968); Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R.R., 380 F.2d 570, 583 (D.C. Cir.), *cert. denied*, 389 U.S. 970 (1967); Manning v. American Airlines, 329 F.2d 32, 34 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964); Chicago R. I. & P. R.R. v. Switchmen's Union, 292 F.2d 61, 71 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Norfolk & P. B. L. R.R. v. Brotherhood of R.R. Trainmen, 248 F.2d 34, 45 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958); Pennsylvania R.R. v. Transport Workers, 202 F. Supp. 134, 137 (E.D. Pa. 1962); American Airlines v. AirLine Pilots Ass'n Int'l, 169 F. Supp. 777, 787 (S.D. N.Y. 1958).

an injunction against a strike over a major dispute, is not controlling here. There the Court expressly noted [362 U.S. at 339] that the union's efforts to negotiate complied with the Act.

On this appeal, aside from determining whether the district court had jurisdiction, our consideration is limited to deciding whether it abused its discretion in granting the interlocutory injunction. *Flight Engineers Int'l Ass'n* v. *American Airlines, Inc.*, 303 F.2d 5, 11 (5th Cir. 1962); *Meiselman* v. *Paramount Film Distrib. Corp.*, 180 F.2d 94, 97 (4th Cir. 1950). The district judge found that at numerous meetings the company sought to bargain with the union over the crew complement, but he described the union as having a "mandatory policy" on this issue. He concluded that this raised questions of law and fact justifying a temporary injunction pending trial of the case. We construe these findings and conclusions as a ruling that the union failed to negotiate in good faith as required by the Railway Labor Act.

In *Flight Engineers Int'l Ass'n* v. *American Airlines, Inc.*, 303 F.2d 5, 11 (5th Cir. 1962), Judge Brown defined the classic office of a preliminary injunction:

> "[To] preserve the status quo pending a judicious, calm and orderly judicial determination of [a] justiciable problem . . . So much so is it that on review of such an interlocutory order, we do not examine into the merits as such. The probable merits are looked to only insofar as they bear on the question whether the trial Court abused its discretion in granting interim relief."

On the record before us we cannot say that the district judge's findings are clearly erroneous or that he abused

his discretion in granting a temporary injunction. Piedmont introduced evidence that the union would not bargain for a crew of less than three men because its bylaw forbade bargaining over that subject.[7] The bylaw does not in itself prove lack of good faith bargaining. *Chicago, R. I. & P. Ry.* v. *Switchmen's Union*, 292 F.2d 61, 67 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962). But use of the bylaw as a reason for refusal to bargain on the issue of crew complement, in the face of the Federal Aviation Administration's certification of the B-737 for two-man crews, is not consistent with the Railway Labor Act's provisions requiring the parties "to exert every reasonable effort to make agreements concerning . . . working conditions, and to settle all disputes . . . in order to avoid any interruption of commerce." 45 U.S.C. § 152, First. See *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 721 n.12 (1945); *American Airlines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 169 F. Supp. 777, 793 (S.D. N.Y. 1958).

At the trial on the merits for a permanent injunction the details of each bargaining session will be more fully developed by examination and cross-examination of the participants. From this the district judge will be in a position to make more definite findings of the historical facts. Conse-

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7 Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, provides that a federal court shall not have jurisdiction to issue a temporary injunction "except after hearing the testimony of witnesses in open court (with opportunity for cross-examination). . . ." The district court granted the preliminary injunction on the basis of documentary evidence supplemented by affidavits and cross-affidavits. We do not condone this departure from the statute's requirements. However, neither party on appeal has complained that the court denied the right to present or cross-examine witnesses. We decline to vacate the district court's order on this technical ground.

quently, what we have said is not intended to anticipate the outcome of the hearing for a permanent injunction. If that trial fails to establish lack of good faith bargaining, the injunction against the strike should be dissolved. Implicit in the Railway Labor Act is the right of employees to strike over a major dispute after the proceedings required by the Act have been exhausted. *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). And even if the trial discloses a lack of good faith bargaining, the injunction must not be a permanent bar to the strike. Provision should be made for its dissolution, whether or not agreement is reached, when the union complies with the Act. The union—no less than the company—has the right to resort to self-help when proceedings under the Act have been exhausted.

Piedmont's refusal of the National Mediation Board's proffer of arbitration denies the company an unqualified right to an injunction against the strike. In *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944), the Court held that § 8 of the Norris-LaGuardia Act[8] barred injunctive relief to an employer who had refused voluntary arbitration under the Railway Labor Act. The union's contention that *Toledo* should govern this case and erect an absolute

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8 Section 8 of the Norris-LaGuardia Act [29 U.S.C. § 108] provides:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

bar to the injunction would be correct were it not for two distinctions. First, in *Toledo* there was no showing that the employees had failed to bargain in good faith. Consequently, proceedings under the Railway Labor Act had been exhausted, and the parties were free to engage in self-help without judicial restraint. A different situation is presented, however, when the employees strike before exhausting the Act's procedures, and the employer refuses arbitration. Then the provisions of the Railway Labor Act and § 8 of the Norris-LaGuardia Act must be reconciled and accommodated to protect the public interest in avoiding interruption of commerce.[9] Mr. Justice Stone's observations in *Virginian Ry* v. *System Fed'n No. 40,* 300 U.S. 515, 552 (1937), about the importance of uninterrupted rail service apply with no less force to interstate transportation by air:

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. . . . Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

The "major purpose of Congress in passing the Railway Labor Act was 'to provide machinery to prevent strikes.'" *Texas & N. O. R.R.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 565 (1930). It is well settled that this purpose can-

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9 The district judge found the strike deprived 11 cities in North Carolina and 7 in Virginia of air service.

not be frustrated when one party fails to comply with the Act. *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30 (1957). Nor should this purpose be frustrated because both parties have failed to utilize the conciliatory machinery provided by the Act. Section 8 of the Norris-LaGuardia Act should then be read as requiring a condition or limitation upon the employer's right to an injunction and not as an absolute ban against the injunction. See *Brotherhood of R.R. Trainmen* v. *Akron & B. R.R.*, 385 F.2d 581, 614 (D.C. Cir.) (dictum) *cert. denied*, 390 U.S. 923 (1968).

The second distinction between this case and *Toledo* lies in the fact that here the union has not accepted arbitration, while in *Toledo* it did. The materiality of this distinction is suggested by *Brotherhood of Ry. & S.S. Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 247 n.8 (1966). There the Court noted that neither party accepted arbitration before the strike, but nevertheless it allowed the employer conditional relief to which it would not have been entitled had the *Toledo* rule been applied.

The most appropriate condition to apply in this case is the maintenance of the status quo. This is the mandate of the Railway Labor Act in analogous situations. 45 U.S.C. §§ 152, Seventh; 155, First; 156; and 160. We, therefore, will require, as a condition to injunctive relief, maintenance of working conditions and established practices in existence before the strike, including three-pilot crews and the rate of pay in effect on July 20, 1969. Cf. *Brotherhood of Locomotive Eng'rs* v. *Missouri-K.-T. R.R.*, 363 U.S. 528, 531 (1960).

What we have said assumes that the controversy over the size of the crew is a major dispute. Both sides have adopted this description and apparently there has been no judicial

inquiry of its aptness. Lurking in the shadows, however, is the suggestion made by the City of Roanoke, Virginia, *amicus curiae*, that the controversy is a minor dispute. Undoubtedly the differences over the crew complement started as a major dispute. However, on July 24, 1968, the parties entered into a supplemental agreement pending arbitration of the dispute between the union and United Air Lines. After arbitrators ruled that the B-737 should be flown by a three-man crew for the duration of United's basic contract with the union, Piedmont and the pilots differed about the meaning of their July 24, 1968 supplemental agreement.[10] The parties' designation

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10 The different interpretations placed upon the supplemental agreement are summarized in Ruby v. Piedmont Aviation, Inc., No. 1820-69, (D. D.C., Aug. 1, 1969):

> "It is ALPA's [the union's] position that the Piedmont-ALPA B-737 agreement of July 24, 1968 was intended to and required Piedmont to continue operation of B-737 aircraft with a three pilot crew in the event of a decision for a three pilot crew on United. ALPA further maintains that the issue of a two or three pilot crew complement has accordingly been resolved by the United-ALPA Special Review Board decision for a three pilot crew, and that the only issues properly open for negotiation and mediation between the parties in Case No. A-8572 were rates of pay and duties for three pilot crew operations. ALPA asserts that it maintained such position in negotiations and mediation in Case No. A-8572.
>
> "It is Piedmont's position that the July 24, 1968 B-737 agreement did not require Piedmont to continue with a three pilot crew in the event of such decision in United-ALPA proceedings, but required only that Piedmont and ALPA reopen negotiations on crew complement and rates of pay if the United-ALPA Special Review Board held for a three pilot crew. Piedmont asserts it maintained such position in negotiations and mediation in Case No. A-8572."

The court made no express finding that this dispute was either a major or a minor dispute. Instead it concluded that the parties had engaged in good faith negotiations, and refused a temporary injunction against Piedmont's use of a two-man crew.

of the dispute is not controlling, *Hilbert* v. *Pennsylvania R.R.*, 290 F.2d 881, 885 (7th Cir.), *cert. denied,* 368 U.S. 900 (1961), so the district court should investigate the character of the controversy. Primary jurisdiction to determine whether the dispute is minor or major rests with the System Board of Adjustment. *Flight Engineers Int'l Ass'n* v. *American Airlines, Inc.*, 303 F.2d 5, 11 (5th Cir. 1962). Therefore, the district court should not decide the case on its merits unless it is clearly shown, despite the supplemental agreement, that the controversy is still a major dispute. If there is a substantial question about the character of the dispute, the district court should condition injunctive relief upon prompt submission of the controversy to the Board so that it may consider the threshold question of its own jurisdiction. *Itasca Lodge 2029* v. *Railway Express Agency, Inc.*, 391 F.2d 657, 665 (8th Cir. 1968). In this event, pending the Board's decision, the district court may continue the injunction to prevent both parties from altering the status quo. *Brotherhood of Locomotive Eng'rs* v. *Missouri-K.-T. R.R.*, 363 U.S. 528, 531 (1960).

The order of the district court is modified and affirmed.

APPENDIX B

(Order of the United States District Court for the Middle District of North Carolina—Winston Salem Division, Dated August 14, 1969)

GORDON, *District Judge*:

This cause coming on to be heard upon the motion for preliminary injunction filed herein, and the Court having considered the pleadings and the evidence and the arguments presented by all parties, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff, Piedmont Aviation, Inc., is a common carrier by air and is engaged in interstate commerce within the meaning of Section 201 of the Federal Aviation Act, 45 U.S.C. § 181.

2. The defendant, Air Line Pilots Association, International, is a "representative" as defined in Section 1, Sixth, of the Railway Labor Act, 45 U.S.C. § 151, Sixth. As such, the defendant is the duly recognized and authorized bargaining agent for the plaintiff's pilot employees.

3. Collective bargaining between the defendant and the plaintiff is subject to the requirements of the applicable provisions of the Railway Labor Act.

4. In the year 1965, the plaintiff initiated the purchase of twelve Boeing 737 twin turbojet aircraft which ultimately were scheduled to be placed in service by the plaintiff, beginning July 1, 1968.

5. The crew complement for such aircraft is a subject with respect to which the plaintiff and the defendant are required to bargain under the provisions of the Railway Labor Act.

6. In the year 1966, the defendant adopted a mandatory written policy, purporting to be binding upon its officers, agents, representatives and members and by which the defendant prohibited them from operating any turbojet aircraft, thereafter certified by the Federal Aviation Administration, on any basis less than that of a three-man crew, regardless of whether or not such aircraft might be certified by the Federal Aviation Administration for operation by less than a three-man crew.

7. On or about December 15, 1967, the Federal Aviation Administration certified the Boeing 737 turbojet aircraft, such as the plaintiff had purchased, as being safe and proper for operation by a two-man crew.

8. In numerous meetings between representatives of the plaintiff and the defendant, the plaintiff sought to bargain with the defendant on the issue of the crew complement for the aforesaid Boeing 737 aircraft. The National Mediation Board twice participated in such meetings.

9. On or about June 16, 1969, the National Mediation Board notified the plaintiff and the defendant that it was withdrawing from the aforesaid bargaining proceedings.

10. On July 24, 1968, the plaintiff and defendant entered into a collective bargaining agreement covering all of the plaintiff's aircraft except the Boeing 737 aircraft.

11. On July 21, 1969, the plaintiff scheduled flights of its Boeing 737 aircraft with two-man crews.

12. On July 21, 1969, the defendant called a strike of all aircraft pilots in the employment of the plaintiff, thereby closing down the plaintiff's operation completely.

13. On July 28, 1969, the plaintiff notified the defendant that the plaintiff was curtailing its operation by eliminating the Boeing 737 jet service and that such curtailed service, with propeller aircraft covered by the collective bargaining agreement, would be initiated on August 5, 1969. The defendant notified the plaintiff that the pilots would not fly the curtailed schedule.

14. By reason of the strike, the plaintiff and the general public are suffering irreparable injury and damage, and will continue to suffer irreparable injury and damage so long as the strike continues for which there is no adequate remedy at law. In particular:

(a) Eleven cities in North Carolina and seven cities in Virginia are deprived of any air service. Consequently, surrounding states are adversely affected.

(b) Thousands of air travelers have been deprived of their right of free travel through the air space of the United States.

(c) Air freight service has been shut off from many areas to the irreparable detriment of commerce, industry and the general public.

(d) Other than pilots, some 2100 non-flying employees are without work and, in some of the states served

by the plaintiff's airline, are ineligible for workmen's compensation and are without necessary support.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this cause.

2. Defendant's call of a strike terminating all the air service of the plaintiff, inclusive of propeller aircraft, raises a substantial question of law and fact for decision in view of the collective bargaining agreement of July 24, 1968, and the mandatory policy of the defendant as to crew complement.

3. It is reasonable and proper that the defendant be restrained from continuing its strike against the plaintiff until this case can be heard and determined on its merits.

Upon the foregoing, it is

ORDERED:

1. That the defendant, its officers, employees, agents, attorneys, and members be and they are hereby enjoined and directed, pending the trial of this cause on its merits, to cancel the strike now in effect among the pilot employees of the plaintiff.

2. That the defendant, its officers, employees, agents, attorneys, and members be and they are hereby directed to forthwith notify all its pilot employees that the said strike is accordingly cancelled and that they are free to resume their work for the plaintiff.

3. That the defendant, its officers, agents, and representatives be and they are hereby enjoined and restrained from calling or causing any strike, slowdown, or similar concerted activities among the said pilot employees during the pendency of this cause such as to affect the operation of the plaintiff's aircraft.

4. It is a condition of this Order that the plaintiff shall file, in the office of the Clerk of this Court, a bond approved by the said Clerk, in the amount of $150,000.00 by which the plaintiff shall undertake and agree that in the event it is finally determined that this Order should not have been issued, then the plaintiff will pay to the defendant such damages, up to the aforesaid amount, as the defendant may have suffered by reason of the issuance of this Order.

5. This Order shall become effective upon the filing of the bond required by this Order.

APPENDIX C

(Order of the United States Court of Appeals for the Fourth Circuit Modifying District Court Order and Denying Motion for a Stay, Dated August 15, 1969)

BUTZNER, *Circuit Judge*:

Upon motion of the Air Line Pilots Association for a stay of the order of the United States District Court for the Middle District of North Carolina, entered August 14, 1969;

It is ADJUDGED and ORDERED:

1. The order entered by the District Court August 14, 1969 is modified by the addition of Paragraph 4(a):

> It is a further condition of this order that Piedmont Aviation, Inc., shall maintain the terms of employment in effect on July 20, 1969, including B-737, 3-pilot crew complement, and B-737 rates of pay.

2. The order of the District Court as amended by this order shall remain in full force and effect pending decision of this interlocutory appeal.

3. The motion for a stay is denied.

APPENDIX D

(Order of the United States District Court for the District of Columbia, Dated August 1, 1969)

CORCORAN, *District Judge*:

This cause came on to be heard upon plaintiff's motion for a preliminary injunction on July 16, 1969. The Court, having considered the pleadings and all other documents filed herein, and having heard argument of counsel for both parties, makes the following

FINDINGS OF FACT

1. Plaintiff Air Line Pilots Association, International ("ALPA") is an unincorporated association organized for the purposes and objectives of a labor organization. ALPA is a "representative" as defined in Section 1, Sixth, of the Railway Labor Act (the "Act"), 45 U.S.C. § 151, Sixth, and is the duly recognized and authorized exclusive collective bargaining agent for the air line pilots employed by defendant.

2. Defendant Piedmont Aviation, Inc. ("Piedmont" or "defendant"), is a common carrier by air engaged in interstate commerce within the meaning of Section 201 of the Act, 45 U.S.C. § 181, and is subject to the provisions of the Act.

3. Collective bargaining between the Association and the defendant is subject to the requirements of the applicable provisions of the Railway Labor Act.

4. Prior to 1967, the defendant purchased twelve Boeing 787 (sic) twin turbojet aircraft which ultimately were sched-

uled to be placed in service by the defendant, beginning July 1, 1968.

5. Following oral discussion by the parties on August 28, 1967, the Association, on October 16, 1967, opened bargaining for a crew complement on the Boeing 737's by submitting to the defendant a proposal calling for a minimum crew of three, including a pilot, co-pilot and observer pilot. Thereafter, the defendant counterproposed a two-man crew complement for the Boeing 737's, consisting of a pilot and co-pilot.

6. During the months of November, December 1967 and January, February 1968, the parties met extensively in collective bargaining but without resolving the dispute over the crew complement for Boeing 737's. On March 1, 1968 the Association applied for intervention by the National Mediation Board. Thereafter the parties met in mediation under Section 5, First, of the Railway Labor Act, 45 U.S.C. § 195, on numerous occasions in the months of May, June and July 1968, but still without resolving the crew complement issue. On such matter, Piedmont proposed a two pilot crew complement and ALPA proposed a three pilot crew complement.

7. On July 24, 1968 ALPA and Piedmont entered into a collective bargaining agreement and a letter of agreement governing operation by Piedmont's pilots of B-737 turbojet aircraft. Said letter of agreement provided:

> "THIS LETTER OF AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between PIEDMONT AVIA-

TION, INC. (hereinafter known as the "Company") and the Air Line Pilots in the service of PIEDMONT AVIATION, INC., as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, (hereinafter known as the "Association").

"WITNESSETH:

"It is hereby agreed that the following rates of pay for operation of B-737 equipment will apply:

"Rates for 3-man operation effective 7/1/68 for 80 hours:

Captain	—$2463
Copilot	— 1600
Second Officer	— 500

"Computed as follows:

Hourly	—Day—11.87 Nite—14.37
Gross Weight	—100,000 lbs.
Mileage	—460 MPH

"Rates for 2-man operation (80 hours) effective 1/1/69 based on the assumption that United procedures or arbitration results in a decision for a 2-man operation:

Captain	—$2763
Copilot	— 1800

"All provisions of the Agreement effective July 1, 1968 not specifically changed or amended by this LETTER OF AGREEMENT shall remain in full force and effect.

"This LETTER OF AGREEMENT shall become effective July 1, 1968 and shall remain in full force and effect concurrently with the Pilot Employment Agreement effective July 1, 1968, except that:

"In the event the United arbitration or procedures result in a decision for a 3-man operation, the parties

> agree to reopen negotiation under the provisions of the Railway Labor Act for 3-man operations and rates of pay beginning January 1, 1969.
>
> "IN WITNESS WHEREOF the parties hereto have signed this LETTER OF AGREEMENT, this 24th day of July, 1968."

8. The reference to "United arbitration or procedures" in the B-737 agreement was to evaluation and other proceedings being conducted pursuant to an agreement between ALPA and United Airlines Inc. on B-737 crew complement. Because of delay in final United-ALPA proceedings, Piedmont and ALPA, by letters dated December 20 and December 27, 1968, extended the January 1, 1969 date of their agreement to coincide with the date for implementation of the Special Review Board decision on United. This exchange of letters did not change the terms of the Piedmont-ALPA agreement dated July 24, 1968, except for the January 1, 1969 date.

9. On February 22, 1969, the United-ALPA Special Review Board issued its final report and recommendations. Said Special Review Board found that the Boeing 737 should be manned by a three pilot crew for the duration of the existing United-ALPA collective bargaining agreement, stating:

> "The B-737 airplane in regular United Air Lines operations should be manned by a three-man crew for the duration of the present basic agreement between the parties."

10. By letter dated February 27, 1969, ALPA advised Piedmont of its intention to reopen negotiations under the provisions of the Act and in accordance with the B-737 letter of agreement dated July 24, 1968. Negotiations were conducted

on March 18, 1969, following which the dispute was docketed by the National Mediation Board under Section 5, First, of the Act as Case No. A-8572. Mediation was conducted in a session held May 5-8, 1969. The Boeing 737 crew complement issue has never been settled.

11. It is ALPA's position that the Piedmont-ALPA B-737 agreement of July 24, 1968 was intended to and required Piedmont to continue operation of B-737 aircraft with a three pilot crew in the event of a decision for a three pilot crew on United. ALPA further maintains that the issue of a two or three pilot crew complement has accordingly been resolved by the United-ALPA Special Review Board decision for a three pilot crew, and that the only issues properly open for negotiation and mediation between the parties in Case No. A-8572 were rates of pay and duties for three pilot crew operations. ALPA asserts that it maintained such position in negotiations and mediation in Case No. A-8572.

12. It is Piedmont's position that the July 24, 1968 B-737 agreement did not require Piedmont to continue with a three pilot crew in the event of such decision in United-ALPA proceedings, but required only that Piedmont and ALPA reopen negotiations on crew complement and rates of pay if the United-ALPA Special Review Board held for a three pilot crew. Piedmont asserts it maintained such position in negotiations and mediation in Case No. A-8572.

13. By letter dated June 6, 1969, the National Mediation Board advised the parties that its mediation efforts had been unsuccessful in Case No. A-8572 and proffered arbitration in

accordance with Section 5, First, of the Act. Piedmont, by letter of June 9, 1969, declined said request to submit the pending dispute to arbitration. By letter dated June 13, 1969, the National Mediation Board advised the parties that its services in Case No. A-8572 were terminated under Section 5, First, of the Act.

14. On June 9, 1969, ALPA applied to the National Mediation Board, pursuant to Section 5, Second, of the Act, for an interpretation of the July 24, 1968 agreement, reached in mediation under the provisions of the Act. Said application for an interpretation is presently before the Board for consideration.

15. On June 16, 1969, Piedmont notified ALPA of its intention to remove the second officer (third pilot) from Piedmont Boeing 737 aircraft effective July 16, 1969. This date was by stipulation of the parties herein changed to July 21, 1969. ALPA commenced the present action on June 30, 1969, seeking a preliminary injunction restraining Piedmont from removing the second officer from B-737 aircraft pending a final determination of this action.

Conclusions of Law

1. This action arises under the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.* This Court has jurisdiction over this action, the parties and plaintiff's motion for a preliminary injunction.

2. The parties have, under the provisions of the Railway Labor Act, engaged in good faith negotiations and mediation

in Case No. A-8572, without reaching an agreement, following which the National Mediation Board has terminated its services under Section 5, First, of the Act.

3. Under the provisions of the Railway Labor Act, the parties to a labor dispute are free, following expiration of 30 days after termination of services under Section 5, First, by the National Mediation Board, to resort to self-help by economic action of either or both parties. *Bh'd of Railroad Trainmen* v. *Jacksonville Terminal Co.*, U.S. , 89 S. Ct. 1109 (1969).

4. The Court finds that plaintiff has not shown a reasonable probability of success upon final hearing of this action.

WHEREFORE, IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction be denied.

APPENDIX E

(Excerpt from Pages 38-39 of Transcript of Hearing Before Judge Corcoran on Motion for Preliminary Injunction, United States District Court for the District of Columbia, July 16, 1969)

The Court: I think we are all familiar enough with the general principles that Congress has in effect instructed the Courts not to intervene in these labor disputes unless there is some very obvious legal question, or some legal reason for coming into them. That is particularly true for these cases that arise under the Railway Labor Act.

The way I size up this case is that the parties did not go to arbitration for some reason best known to them and not to this Court. Mediation has failed, and the board has washed its hands of the case.

I don't see that there is any substantial legal issue left to be litigated in this particular case. I think before I could step in and grant an injunction, keeping in mind also the prohibitions of the Norris-LaGuardia Act against stepping in on labor disputes and so forth, I would have to be convinced that there was a definite substantial legal issue in which the petitioner had a very good chance of success.

I don't find that chance of success in this case. I am not convinced that there is a legal issue left in the case. So, I am going to deny the preliminary injunction. I ask you to submit proposed findings of fact.

APPENDIX F

(Judgment of the United States Court of Appeals for the Fourth Circuit, Dated September 29, 1969)

JUDGMENT

Before WINTER, CRAVEN, and BUTZNER, *Circuit Judges*:

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, it is ADJUDGED and ORDERED:

1. The judgment of the district court is modified as follows:

   It is a further condition of the order of August 14, 1969 entered by the district court that Piedmont Aviation, Inc. shall maintain the terms of employment in effect on July 20, 1969, including B-737 three-pilot crew complement and B-737 rates of pay.

2. In all other respects the judgment of the district court is affirmed and this cause is remanded for further proceedings.

3. Each party shall bear its own costs.

4. Let the mandate issue forthwith.

Filed: September 29, 1969

For the court:

JOHN D. BUTZNER, JR.
Judge, United States Court of Appeals for the Fourth Circuit

SAMUEL W. PHILLIPS
Clerk

APPENDIX G

(Statutory Provisions Involved)

Section 2, First of the Railway Labor Act

Sec. 2. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2, Second of the Railway Labor Act

Sec. 2. Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Section 5, First of the Railway Labor Act

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

SECTION 6 OF THE RAILWAY LABOR ACT

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In

every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

SECTION 1 OF THE NORRIS-LAGUARDIA ACT

Sec 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

SECTION 2 OF THE NORRIS-LAGUARDIA ACT

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to

protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SECTION 4 OF THE NORRIS-LAGUARDIA ACT

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike

or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or in prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SECTION 7 OF THE NORRIS-LAGUARDIA ACT

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath,

and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and

irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Appendix G—Statutory Provisions Involved

SECTION 8 OF THE NORRIS-LAGUARDIA ACT

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SECTION 9 OF THE NORRIS-LAGUARDIA ACT

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 995

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Petitioner,*

-v-

PIEDMONT AVIATION, INC., *Respondent.*

On Petition for Writ of Certiorari

BRIEF OF PIEDMONT AVIATION, INC. IN OPPOSITION

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IN THE

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NO. 995

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Petitioner,*

-v-

PIEDMONT AVIATION, INC., *Respondent.*

On Petition for Writ of Certiorari

BRIEF OF PIEDMONT AVIATION, INC. IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Airlines' Transition To Twin Jet Aircraft

Approximately ten years ago, twin turbine-powered transport aircraft were introduced into the air carrier industry (Saunders,[1] p. 1, ¶2). These short-haul aircraft were designed and manufactured for operation by a crew complement of two people, a pilot and co-pilot (Saunders, Supp., pp. 1-3 ¶¶ 1-4; Tadlock, pp. 1-2, ¶¶1-2). They were exhaustively tested and certified by the Federal Aviation Agency for safe opera-

[1]Affidavits of record are referred to by the last names of the affiants.

tion by such a crew complement (Saunders, pp. 2-3, ¶4; Tadlock, p. 2, ¶2).

By late 1965, the majority of domestic air carriers, including Piedmont's principal competitors, had purchased and were utilizing these aircraft (Saunders, p. 2, ¶3; p. 7, ¶13). At that time, after having made a thorough evaluation of its own, Piedmont ordered twelve Boeing 737 turbo jets to be delivered in 1968 at a cost in excess of $40,000,000 (Saunders, p. 3, ¶6; p. 8, ¶16).

At various times during this period, the airlines which purchased such jets bargained with the petitioner, Air Line Pilots Association, on crew complements for the new jet equipment. Such bargaining invariably resulted in contracts providing for operation by a two-man crew (Saunders, p. 2, ¶3; p. 5, ¶9; p. 7, ¶¶12-13). The Union continued, by contractual arrangements, to approve two-man crew complements until after mid-year 1966.

The Union's Decree — No Additional Two-Man Crews And No Bargaining On The Subject

At a private convention in August 1966, by amendment to its constitution, the Union issued a "mandatory policy" which directed that "all future turbine-powered transport aircraft will be . . . manned by a minimum crew of three pilots" (Saunders, p. 5, ¶9; Tadlock, Exhibit C). Elsewhere, the Union's constitution ordered its negotiators to "function" in accordance with such "policy" and provided for fines, sus-

pension or expulsion of any member who might violate such order (Saunders, p. 4, ¶8).

The Union's edict was issued unilaterally, without any actual notice to Piedmont, approximately one year before any notice such as is required by Section 6 of the Railway Labor Act, 45 U.S.C. § 156, was served by either party with respect to jet crew complements.

The Union's Adamant Refusal To Bargain

Pursuant to Section 6 notices, which were served by the parties on July 27 and 28, 1967, the subject of crew complement for Piedmont's forthcoming jets was raised at bargaining sessions in the Fall of that year (Bradley, pp. 1-2, ¶¶3-5). The Union's initial proposal was accompanied by "assertions that compulsory policy of the Union as established in its by-law 'bound' its negotiators to refrain from bargaining for operation of the Boeing 737 by a two-man crew" (Bradley, p. 2, ¶5).

Thereafter, the parties met in numerous bargaining sessions up to July 24, 1968 (Bradley, pp. 2-3, ¶6). Throughout all of these sessions, the Union's negotiators consistently, steadfastly and repeatedly advised the Company that they "would not bargain for a crew of less than three men, because the Union's constitution and by-law policy forbade such bargaining over that subject" (Saunders, p. 6, ¶11; Tadlock, p. 2, ¶3; Bradley, pp. 1-4,¶¶2, 5, 7). During these meetings the Union's chief negotiator admitted to Piedmont representatives that even ". . . if the committee signed a

two-man contract with Piedmont, such contract would be rejected by the Union's President" (Saunders, p. 6, ¶11). None of the foregoing has been denied by the Union.

Finally, on July 24, 1968, it was agreed that bargaining sessions would be suspended pending a decision on arbitration of a similar issue between the Union and United Air Lines. That agreement provided that in the event the arbitration decision required a three-man complement on United planes, Piedmont and the Air Line Pilots Association would "reopen negotiation[s] under the provisions of the Railway Labor Act for 3-man operations and rates of pay" (Shipton, Exhibit B; Saunders, p. 9, ¶18).

The United arbitration decision was handed down in two parts on February 10 and 22, 1969. This decision left the issue unresolved and called for further evaluation and a new arbitration in the event agreement was not reached between United and the Union (Kozak, Exhibits D and E).

Shortly after issuance of that decision, meetings were resumed between Piedmont and the Union. However, the Union continued in its flat refusal to bargain, adding as an attempted justification for such refusal, a claim that it understood the July 24 agreement to constitute a requirement that Piedmont was bound to operate with a three-man crew without bargaining (See Savelson, Exhibit A, p. 3, allegation 12).

In the Spring of 1969, pilot unrest over the failure of the parties to settle the issue became intensified

to a point that the Union felt it necessary to make an explanation. On May 20, Master Executive Council Chairman Kozak wrote a letter to all pilots (Tadlock, Exhibit C). Kozak, acknowledging that the crew complement issue was a serious problem, quoted the Union's "mandatory crew manning policy" and the constitutional restriction which limited decision-making power of union negotiators to those items not "provided [for] elsewhere in the Constitution and By-Laws." After listing the penalties for disobedience of the Union's policy, Kozak summarized: "These are just the hard, cold *facts*. . . . Our latitude in resolving this particular problem is very limited."

The Union's Lawsuit For "Breach of Contract"

On the basis of its claim that Piedmont was bound to a three-man crew by the July 24, 1968 agreement, the Union instituted suit in the United States District Court for the District of Columbia on June 30, 1969 (Savelson, Exhibit A). In its complaint, the Union characterized that document as a "collective bargaining agreement" which required "that Piedmont's Boeing 737 aircraft would continue to be operated with a three pilot crew" (Savelson, Exhibit A, p. 3, ¶¶11-12). With its complaint, the Union moved for a preliminary injunction ". . . directing defendant [Piedmont] to operate Boeing 737 aircraft with a three pilot crew complement" (Savelson, Exhibit A, p. 9, ¶1(b)). That motion was denied by Judge Corcoran upon affidavits and without testimony or opportunity for presentation of testimony and cross ex-

amination of witnesses (Savelson, p. 2, ¶4; Exhibit F). Piedmont has never sought any relief on its pleadings in the District of Columbia case and there has been no hearing on that subject.

The Proceedings Before The Courts Below

The instant case was initiated in the District Court in North Carolina upon complaint of Piedmont that the Union's unilateral action in ordering that jet aircraft be flown only by minimum crews of three pilots, coupled with its refusal to bargain on the subject, was a direct violation of the requirements of Section 2 of the Railway Labor Act, 45 U.S.C. §152. There has been no testimony or cross examination of witnesses in the case.[1] Piedmont's motion for a preliminary injunction was granted upon the basis of documentary evidence and affidavits only.

The Union moved for a stay of the injunctive order. In denying such motion, the District Judge offered the alternative of an expedited trial on the merits. The Union rejected the Court's offer (App.,[2] p. 1) and elected to appeal immediately.

The Court of Appeals below "accelerated this interlocutory appeal" (Pet. App.,[3] p. 2a) and amended the

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[1]By tacit consent of the Court and the parties, Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107, requiring testimony in open court was waived (Appendix to the Petition, p. 6a, fn. 7).

[2]Appendix to this brief.

[3]Appendix to the Petition for Certiorari.

District Court's order by adding ". . . as a condition to injunctive relief, maintenance of working conditions and established practices in existence before the strike, including three-pilot crews and the rate of pay in effect on July 20, 1969" (Pet. App., p. 9a). Thus, that part of the order accords to the Union precisely the same relief which it sought in its motion in the District of Columbia case.

SUMMARY OF ARGUMENT

This Court does not disturb factual determinations of lower courts in cases where there is no showing of very obvious and exceptional error. No such error has been shown to exist in this case. The composite findings of the District Court and the Court of Appeals below that the Union violated the compulsory bargaining requirements of the Railway Labor Act are supported by an abundance of evidence which, for the most part, is uncontradicted. The Air Line Pilots Association, therefore, is bound by that factual determination on this interlocutory appear.

As amended by the Court of Appeals, the injunctive order bars removal by Piedmont Aviation, Inc. of the disputed third crewman from its jet equipment. The Union has sought precisely such an order against Piedmont in a lawsuit of its own in the District Court for the District of Columbia. In that case, the Union contended that the *status quo ante* should be maintained until the rights of the parties had been adjudi-

cated. That is exactly the purpose and effect of the order for which the Union now petitions this Court for a writ of certiorari.

The Court of Appeals remanded the case with directions for the District Court to resolve the threshhold question of whether the Court has jurisdiction. Resolution of that issue, as well as other unsettled issues in the case, could result in a disposition of the controversy without a trial on the merits. Accordingly, the case is not ripe for review by this Court and the petition is premature.

There is no authority from any source which supports the Union's contention that a finding that it has refused to bargain was precluded in this case by obiter dictum of the District Court for the District of Columbia in the Union's case, which recited that "the parties" have bargained in good faith.

The Union's assertion that the decision in this case is in conflict with decisions from other courts of appeals is without any foundation. It cites only two cases involving the Railway Labor Act[1] to support its contention. In each of those cases, the Court of Appeals for the Second Circuit held that no injunction should be granted because, and only because, it was found that the union had not failed to bargain in good faith, which is precisely contrary to the finding of the Courts below in the instant case.

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[1]*Chicago, Rock Island and Pacific R. R. v Switchmen's Union,* 292 F. 2d 61 (2nd Cir. 1961); *Pan American World Airways, Inc. v. Flight Engineers Int'l. Ass'n.,* 306 F. 2d 840 (2nd Cir. 1962).

All other cases cited by the Union[1] to support its claim that conflict exists involved procedural questions of venue only. In each of those three cases, the court of appeals reviewed a discretionary ruling of the district court and in each the result was controlled by the facts peculiar to that case. In this case, the discretionary ruling of the District Court has been reviewed and sustained by the Court of Appeals. There is no conflict with the decisions from other circuits, and it is well settled that this Court will not review such decisions.

Issuance of the injunctive order below is in accord with, and is fully supported by, pronouncements of this Court and numerous decisions of various courts of appeals and district courts. These decisions uniformly hold that the Railway Labor Act takes precedence over the Norris-LaGuardia Act and refute the Union's contention that the District Court was precluded by the Norris-LaGuardia Act from issuing the injunctive order in this case.

ARGUMENT

I. There Is No Reason For Issuance Of A Writ Of Certiorari

The central, all-pervading and ultimately determinative question in this case is whether the Union

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[1] *Hilton Hotels Corp. v. Weaver,* 325 F. 2d 1010 (D. C. Cir. 1963); *Crosley Corp. v. Hazeltine Corp.,* 122 F. 2d 925 (3rd Cir. 1941); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry.,* 411 F. 2d 320 (5th Cir. 1969).

fulfilled its collective bargaining obligations under Section 2 First and Second of the Railway Labor Act, 45 U.S.C. §152 First and Second, and thereby exhausted all remedies therein provided, before it took strike action against Piedmont. The injunctive order of which the Union complains was issued to preserve the *status quo ante* pending resolution of that crucial question by the Court below.

Yet it will readily be observed that the Union has not even addressed itself to that question in its petition to this Court. The Union, instead, has avoided the real issue and has proceeded throughout its petition on the totally unwarranted assumption that it has been judicially established that the Union bargained collectively and in good faith at all times and has thereby exhausted all remedies provided for in the Act. Its often repeated naked assertions that all such remedies have been fully exhausted are coupled with a recitation to the Court of mere contentions of the Union, as if they were judicially-established fact.

The end result is a petition which presents to the Court hypothetical questions which bear little resemblance to the real issues involved.

A. The Petition Is Premature

Throughout its petition, the Union treats the case as if Piedmont is authorized by the existing order to remove unilaterally the third crew member from its jet equipment and, if it does so, the Union would have no recourse whatever. The true facts are to the contrary.

As has been noted, shortly before institution of this case, the Union filed suit in the District of Columbia, seeking an injunction "directing defendant [Piedmont] to operate Boeing 737 aircraft with a three pilot crew complement . . ." until expiration of the United Air Lines contract with the Union on March 2, 1970, five weeks hence. The objection most vigorously urged by the Union upon the Court of Appeals for the Fourth Circuit was its claim that the injunction issued by the District Court in North Carolina unfairly authorized unilateral action by Piedmont while at the same time it prohibited retaliatory action by the Union. The Court of Appeals granted relief to the Union by adding the condition, quoted above, that Piedmont shall only operate its jets with three-man crews.

The obvious effect of the condition attached by the Court of Appeals was a nullification of all that portion of the District Court's injunction to which the Union actually had objections. The aircraft are now flying with three-man crews and at rates of pay which were in effect before the strike and litigation. *If Piedmont should elect to remove the third pilot from its airplanes, the Union would be completely free to resume its strike as if no court order had ever been entered.*

As matters now stand, the sole compulsion upon the Union in the order of the Courts below is a prohibition against its taking unilateral action against Piedmont so long as the Company maintains the

status quo ante. But the Union has consistently asserted throughout all the litigation that it has no desire to strike and has repeatedly insisted that *status quo ante* conditions be maintained so that no strike would be necessary.

For example, in the District of Columbia case, union counsel summarized that:

> "A preliminary injunction is necessary to preserve the status quo until a final decision can be made. The choice would seem to be unilateral action by Piedmont with a response [or strike] by the pilots or an orderly process by which the parties can determine their respective obligations under the [July 24] agreement, and then go forward.
>
> "The pilots have opted at this time for a preliminary injunction to preserve the status quo so that each side will be fully aware of its legal obligations and will be able to carry them out *before any economic action or economic battle ensues on the airline*" (emphasis added) (App., p. 2).

It appears, therefore, that what the Union actually is seeking in its petition for a writ of certiorari is a plotting of the course which the case shall follow when it comes to trial on the merits in the District Court below. The Union has not dealt with the question of why this Court should be expected to review the case at this time when the Union's claims of immediate injury by the injunctive order in the District Court have been adequately remedied by the

Court of Appeals and when every question raised in the case may be mooted in the District Court upon the remand already ordered by the Court of Appeals.

There are several circumstances in this case which could moot the issues upon remand. At least one such circumstance looms at the very threshhold and certainly should be dealt with before any review is undertaken by this Court. The parties have proceeded throughout on the theory that the case involves a "major dispute" under the Railway Labor Act. Both parties still contend that it is such a dispute.

The fact remains, nevertheless, that the Court of Appeals found that "lurking in the shadows . . . is the suggestion made by the City of Roanoke, Virginia, *amicus curiae*, that the controversy is a minor dispute" (Pet. App., p. 10a). It was decreed "therefore, [that] the district court should not decide the case on its merits unless it is clearly shown . . . that the controversy is still a major dispute" (Pet. App., p. 11a). It was further directed that in the event the dispute is found to be a "minor" one, it must be resolved by the System Board of Adjustment through binding arbitration procedures provided for in the Act.

Surely the Court should not be put to the task of passing upon the merits of the case when it is so obvious that it may never reach a trial upon the merits.

> "We feel that we should not pass upon any of the complicated and delicate questions involved in the case . . . upon an appeal from a mere inter-

locutory injunction and upon the inadequate record now available, but should await the completion of the hearing in the court below, at which time it will be possible to consider the questions upon an adequate record and avoid a fragmentary hearing. . . ."

Sims v. Central Trust Co., 123 F. 2d 89, 90 (4th Cir. 1941)

"[A]s the case is yet to be heard . . . upon the facts, it is undesirable that we discuss the evidence or make statements with regard thereto which might be seized upon by the parties as indicating an opinion on our part as to how the case should be decided. The principles of law involved are important and difficult of application to the facts; and we should refrain from discussing them until the case to which they are to be applied is before us in final form."

Meiselman v. Paramount Film Distributing Corp., 180 F. 2d 94, 96 (4th Cir. 1950)

B. There Is No Conflict Among The Courts Of Appeals

All of the decisions of the courts of appeals on the subject in question apply uniform legal principles to various sets of facts. The petitioner has failed to accept the significance of Rule 19.1 (b) of this Court, which makes it plain that a conflict of circuits is created only when decisions are in conflict "on the

same matter." Obviously, a conflict is not created when one court of appeals refuses to grant a preliminary injunction on one set of facts and another court of appeals grants a preliminary injunction on a different set of facts.

1. The Asserted Conflict With Second Circuit Decisions

The Union contends that the Fourth Circuit's decision in this case conflicts with *Chicago, Rock Island and Pacific R. R. v. Switchmen's Union*, 292 F. 2d 61 (2nd Cir. 1961). Such contention certainly would be received with shock in the Fourth Circuit, since that Court's opinion evidenced careful study of the *Chicago, Rock Island* opinion, and expressly followed that decision in the instant case. The Court cited the *Chicago, Rock Island* decision twice, approving the legal principles enunciated therein. But, at the same time, it pointed out critical factual distinctions in the two cases.

Moreover, in the *Chicago, Rock Island* case, the Second Circuit expressly refused to pass upon the question presented in this case. In that case, bargaining had actually resulted in agreement between union and company negotiators. Even so, the District Court found that a requirement of the Union's constitution that any agreement made by the union negotiators must be approved by a majority vote of the union membership, coupled with the negotiators' submission of the agreement to the union membership without recommending approval, was unlawful.

In considering the case, the Court of Appeals for the Second Circuit hypothetically posed the question of whether an injunction might issue in a case where: — "[T]he claim is that although the motions specified by the Railway Labor Act were performed, the required spirit was lacking. Appellees argue with force that *it is as much a violation of the Railway Labor Act to make only a token effort to comply with its prescribed processes as to strike without even the pretense; . . .*" (emphasis added), *Chicago, Rock Island and Pacific R. R. v. Switchmen's Union*, 292 F. 2d 61, 67 (2nd Cir. 1961).

It would be difficult to find words which more precisely or succinctly describe the issue which is raised in the instant case. Having found, however, that the plaintiff's evidence did not support its "claim" in the *Chicago, Rock Island* case, the Court ruled that *"We find it unnecessary here either to affirm or to deny that an injunction against a strike may be issued on such a claim, . . ."* (emphasis added), *Chicago, Rock Island and Pacific R. R. v. Switchmen's Union, supra*, at p. 67.

The Second Circuit went on to explain in detail that there was no substantial evidence in the *Chicago, Rock Island* case to support the plaintiff's claim or the District Court's finding that the Union there had not bargained in good faith. The only evidence tending to support the claim was the failure of union negotiators to recommend ratification of the negotiated agreement by the Union's membership.

That case bears no resemblance to this case, where, for example, it is in effect conceded that the union negotiators have openly admitted to Piedmont representatives that *"we have no authority to confer* on crew complement, and on this issue of crew complement *our authority to negotiate has been withdrawn"* (Saunders, pp. 5, 6, ¶11) and have repeatedly insisted that they were "bound" by the Union's "mandatory and compulsory policy" to refrain from bargaining on the crew complement subject (Saunders, p. 6, ¶11; Tadlock, p. 2, ¶3; Bradley, pp. 1-4, ¶¶2, 5, 7).

Further distinguishing the cases are the Union's statement to Piedmont that even if a two-man agreement were signed, it would be rejected by the Union's president (Saunders, p. 6, ¶11) and its declaration to its own member pilots that the authority of its negotiators was "extremely limited" and, in effect, that such an agreement was blocked by mandatory union policy (Tadlock, Exhibit C).

The Union labors at length over its claim that a conflict exists because, in construing Section 7 of the Norris-LaGuardia Act in the *Chicago, Rock Island* case, the Court of Appeals for the Second Circuit stated that a necessary prerequisite to injunctive relief is a showing that there has in fact been a violation and that is it not enough to show merely that the Act might have been violated.

But that section of the Norris-LaGuardia Act merely limits injunctions to cases where there are "findings of fact by the court, *to the effect* — (a) That unlaw-

ful acts . . . have been committed . . ." (emphasis added), Norris-LaGuardia Act §7, 29 U.S.C. §107. The composite findings and conclusions of the District Court and the Court of Appeals in this case are fully in accord both with the express language of Section 7 and the pronouncement of the Second Circuit.

The admissions of the union negotiators noted above were considered by the Court of Appeals to be clear "evidence that the Union did not bargain." Accordingly, it construed the District Court's order as a ruling "that the Union failed to negotiate in good faith as required by the Railway Labor Act" (Pet. App., p. 6a). Furthermore, the Court of Appeals expressly declared that "use of the by-law as an excuse for refusal to bargain . . . is not consistent [that is, not in compliance] with the Railway Labor Act's provisions . . ." (Pet. App., p. 6a). It is difficult to see how this can be said to fall short of a finding that the Union has violated the Railway Labor Act.

In apparent recognition that any defects in the findings and conclusions of the District Court were cured by the Court of Appeals, the Union insists that this Court should focus its attention exclusively upon the language of the District Court, as if it had never been amended or passed upon by the Court of Appeals. But this Court has repeatedly turned aside efforts of litigants thusly to inject it into the fact-finding processes of lower courts.

> "[T]he probative sufficiency of the testimony has the support of the district court . . . and of

the circuit court of appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength, . . ."

Delaney v. United States,
263 U. S. 586, 589-590 (1924),
quoted in *United States v.*
Johnson, 319 U. S. 503, 518
(1943)

"The petitioner asks us to reject as 'clearly erroneous' the factual conclusion . . . reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncement that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' . . . For there was no 'very obvious and exceptional' error in the conclusion of the two courts below. . . ."

Berenyi v. Immigration and
Naturalization Service,
385 U. S. 630, 635 (1967)

This presumption of validity of concurrent factual determinations is clearly applicable to Railway Labor Act cases. *Virginian Ry. v. System Federation No. 40,* 300 U. S. 515, 542 (1937); *Texas & New Orleans R. R. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930).

What has been stated about the *Chicago, Rock Island* case is also true of the Union's claim that the instant case is in conflict with the decision of the Second Circuit in *Pan American World Airways, Inc. v. Flight Engineers Int'l. Ass'n.*, 306 F. 2d 840 (2nd Cir. 1962). It is axiomatic, of course, that the duty to bargain does not require concession or agreement. The *Pan American World Airways* case merely followed that axiom in finding no refusal to bargain. That case has no bearing where, as here, a union has unilaterally determined in advance that there will be no bargaining with respect to a bargainable issue and has consistently and adamantly enforced its unilateral determination.

The remaining cases as to which the Union claims there is conflict deal, not with labor law as such, but with the discretionary authority of lower courts in disputes over venue.

2. *Procedural Cases From Other Circuits*

Prior to the hearing in the District Court below, the Union moved that the case be transferred to the District of Columbia (Motion, August 8, 1969). Such motion was based upon venue considerations and the Union's contention that its case in the District of Columbia raised issues identical to those raised in the Company's case.

Piedmont responded with uncontradicted proof that its corporate existence, as well as the center of its operations, was at Winston-Salem, North Carolina; that practically all witnesses who would be in-

volved in the case resided in the Winston-Salem area; that all of the bargaining sessions with which the case was concerned were held at that location; that for many years grievance procedures and arbitration cases before the System Board of Adjustment invariably have been held in Winston-Salem; and that Piedmont had not sought, and would not seek, any affirmative relief in the Union's District of Columbia action (Bradley, Reply).

It was shown to the satisfaction of the District Court, moreover, that it was the sole purpose of the Union's District of Columbia action to test the Company's right to take unilateral action, and that the question of whether the Union had a right to take such action was never mentioned in the pleadings, or evidence, or affidavits, or arguments in the Union's case. It was conceded that at the time of the hearing in the District of Columbia there was no strike by the Union and no voiced threat that a strike would be called. Further, it was proved that whereas the Union's action was for declaratory and injunctive relief upon an alleged contract, the purpose of the instant case was to test the validity of the Union's strike activities before it had ever made any effort to reach agreement with Piedmont.

Upon the basis of these considerations, the District Court, in the exercise of its discretion, refused to transfer this case to the District of Columbia. The authorities amply support that decision.

"The transfer of pending civil cases from one district to another is governed by 28 U.S.C. §1404(a) which provides '(a) for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' The burden of establishing that the suit should be transferred is upon the movant and unless the evidence and the circumstances of the case are strongly in favor of the transfer the plaintiff's choice of forum should not be disturbed. The transfer lies within the sound judicial discretion of the trial judge and his determination should not be rejected unless the appellate court can say there has been a clear abuse of discretion."

Texas Gulf Sulphur Co. v. Ritter, 371 F. 2d 145, 147 (10th Cir. 1967)

See also: *Toti v. Plymouth Bus Co.*, 281 F. Supp. 897 (S.D. N.Y. 1968); *Blue Diamond Coal Co. v. United Mine Workers*, 282 F. Supp. 562 (E.D. Tenn. 1968); *New York Central R. R. v. United States*, 200 F. Supp. 944 (S.D. N.Y. 1961); *Mazinski v. Dight*, 99 F. Supp. 192 (W.D. Pa. 1951).

The cases cited by the Union as being in conflict on this question certainly present no inconsistency of a sort which could invoke the jurisdiction of this Court on writ of certiorari. In *Hilton Hotels Corp. v. Weaver*, 325 F. 2d 1010 (D.C. Cir. 1963), on the basis of "comity" only, the Court of Appeals for the

District of Columbia Circuit deferred to the Court of Appeals for the Third Circuit and refused to "reexamine" the latter Court's resolution of identical issues.

In *Crosley Corp. v. Hazeltine Corp.*, 122 F. 2d 925 (3rd Cir. 1941), the Court of Appeals for the Third Circuit expressly based its decision on the conclusion that the district court, "having the power to issue [a preliminary injunction to protect its jurisdiction] abused its discretion in refusing to exercise that power." *Id.* at 930. Likewise, in *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry.*, 411 F. 2d 320 (5th Cir. 1969), the Court of Appeals found abuse of discretion in the district court's refusal to transfer the case to another district court where the plaintiff had already secured an injunctive order identical to the one sued for in the later case.

At most, those cases differ from the instant case only in the outcome of the procedural questions presented. And, in each case, the outcome hinged, not upon conflicting interpretations of legal questions, but upon factual considerations peculiar to the case itself. Thus, with its assertions that this Court should take cognizance of such alleged "conflict," the Union again seeks to inject the Court into a review of the evidence and the inferences drawn from it by the Courts below.

II. The Courts Below Were Not Bound By The Obiter Dictum Of The District Court For The District Of Columbia

As is noted in the appendix to the Union's petition, the District of Columbia Court denied the Union's motion for an injunction enforcing the alleged contract for the following reasons, announced at the close of the hearing:

> ". . . Congress has in effect instructed the Courts not to intervene in these labor disputes unless there is some very obvious legal question, or some legal reason for coming into them.
>
> . . .
>
> "I think [that] before I could step in and grant an injunction . . . I would have to be convinced that there was a definite substantial legal issue in which the petitioner [plaintiff] had a very good chance of success.
>
> "I don't find that chance of success in this case. I am not convinced that there is a legal issue left in the case. So, I am going to deny the preliminary injunction" (Pet. App. E).

Later, that Court entered a written order and, even though no findings of fact were made on the subject, the Court adopted a so-called "conclusion of law," suggested by the Union, which stated that "the parties have, under the provisions of the Railway Labor Act, engaged in good-faith negotiations . . ." (Pet. App., p. 6d, ¶2).

The Court's decision being in favor of Piedmont, it is elementary, of course, that Piedmont could not possibly appeal from reasons advanced by the Court for ruling favorably to the Company. Yet, the Union insists that, regardless of whether or not it in fact refused to bargain with Piedmont, judicial inquiry into the subject is forever barred by the interlocutory dictum of the Court in that case. Otherwise stated, the Union is advancing the amazing proposition that a litigant's rights as to the merits of a case may be established adversely to him by recitations volunteered in a preliminary order in which he has prevailed and from which no appeal can be taken by him!

The reason and logic which so clearly refute the Union's novel contention are fully supported by numerous court precedents. In the first place, the doctrine of "the law of the case" applies only where two different judges rule upon the identical question in the same case, *e.g.*, *Bowles v. Wilke*, 175 F. 2d 35 (7th Cir.), cert. den., 338 U. S. 861 (1949). But it is not necessary for Piedmont to rely on that fact alone to sustain its position.

Even if the orders of Judges Corcoran and Gordon had been entered in the same case, the Union's contention could not be sustained. Judge Corcoran's "conclusion" on the subject of bargaining in the breach-of-contract case was nothing more than obiter dictum which could not serve as a bar to a subsequent finding to the contrary. Since at least as far back as 1821, this Court has considered that:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious."

Cohen v. Virginia,
6 Wheat. 264, 399 (1821)

See also: *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98 (1937); *Wright v. United States*, 302 U. S. 583 (1938).

Moreover, even if the question had been squarely presented to Judge Corcoran on a preliminary motion such as the Union's, his interlocutory ruling would not have barred a second order in conflict with his first decision.

"In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

Messinger v. Anderson,
225 U. S. 436, 444 (1912)

"[The rule of the law of the case] is not applicable here because when the case was first re-

manded, nothing was finally decided. The whole proceeding thereafter was in fieri. . . . This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 USCA §1253, FCA title 28, §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata. Compare United States v. Wallace & Tiernan Co. 336 US 793, 800, 801, 93 L ed 1042, 1049, 1050, 69 S Ct 824. And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here."

United States v. United States Smelting, Refining & Mining Co., 339 U. S. 186, 198-199, reh. den., 339 U. S. 972 (1950)

"'There is sound reason for the rule that the decision of either the trial or appellate court in granting or denying the temporary injunction does not constitute the law of the case and will not estop the parties nor the court as to the merits of the case. . . .'"

Hunter v. Atchison, T. & S. F. Ry., 188 F. 2d 294, 299 (7th Cir. 1951)

See also: *Bowles v. Wilke*, 175 F. 2d 35 (7th Cir. 1949).

III. The Decision Below Is Entirely Consistent With Principles Enunciated By This Court And Is Fully Supported By Other Court Precedents

The state of the record is such that the Union's position on the merits necessarily is based upon the premise that the Union is authorized to dictate unilaterally in advance what a rule or condition of employment will be and then to meet with the carrier only to advise that its directive cannot and will not be changed, thus marking time until the calendar runs out on Railway Labor Act procedures — and, that in all of this the Union shall be free from any legal sanction. Court precedents uniformly refute that proposition.

In the landmark case construing Section 2 of the Railway Labor Act, 45 U.S.C. §152, and directing a carrier to "treat with" and "exert every reasonable effort to make and maintain agreements" with the representative of its employees, this Court stated:

> "It is, we think, not open to doubt that Congress intended that this requirement [to bargain] be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. . . . Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the Brotherhood of R. & S. S. Clerks Case, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427, supra, lend support to the contention that its enactments, which are mandatory in form and capa-

ble of enforcement by judicial process, were intended to be without legal sanction."

Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 545 (1937)

Very recently this Court emphasized that the duty imposed by Section 2 First rests equally upon carriers and unions: — "The heart of the Railway Labor Act is the duty, imposed by §2 First upon *management and labor*, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof' " (emphasis added), *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369 (1969).

This Court further emphasized that in order to exhaust the procedures which ultimately can lead to authorized unilateral action: — "*A party* desiring to effect a change of rates of pay, rules, or working *conditions must give advance written notice* [, §6, and] must confer, §2 Second, . . ." In addition, the Court pointed out that "while the dispute is working its way through these stages, *neither party may unilaterally alter the status quo*. §§2 Seventh, 5 First, 6, 10" (emphasis added), *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co., supra*, at 377-378.

The actual power of the Petitioning Union to enforce its unilateral mandatory order with respect to crew complements on twin-engine jets should not be doubted — such order was totally effective. Of the 438 twin jets now in service on the airlines, 348 are being flown with two-man crews. But all of these within the Union's jurisdiction are being so operated only because the Union earlier gave its consent and approval. Piedmont's principal competitors are in this category (Saunders, p. 7, ¶12; Saunders Supp., p. 2, ¶4). Among the ninety remaining twin jets, not one of those covered by the Union's edict has flown with fewer than three crewmen since the Union's order was issued in 1966.

The Union undertakes to justify its mandatory order with the argument that it is interested in safety and that, as to its "revised pilot crew complement policy . . ., there never has been any substantiated contention that this was based on other than safety considerations" (Pet., p. 6).[1] But that in no way justifies the Union's refusal to bargain with Piedmont on the subject. The carrier certainly has a legitimate interest in air safety. Indeed, it has no alternative.

---

[1]In controverting this assertion, Piedmont has challenged the Union in bargaining (Bradley, p. 3, ¶ 7; Saunders, pp. 6, 7, ¶ 12, p. 8, ¶ 15), and throughout this case, to justify its discrimination between the twin jets on which it has agreed to place two crewmen and those which it has refused to fly with less than three crewmen. That challenge has been ignored by the Union.

In regulating safety in air commerce, Congress admonished the Federal Aviation Agency that:

> "In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with *the highest possible degree of safety in the public interest*" (emphasis added).
>
> Federal Aviation Act of 1958, §601(b), 49 U.S.C. §1421(b)

Congress certainly did not intend to permit the Union to set itself up as a dictator of air safety policies.

> "The Federal Aviation Act of 1958 (49 U.S. C.A. §§1301-1542), imposed upon the [Administrator] the duty and responsibility of promulgating rules and regulations to provide adequately for *the highest possible degree of safety in air commerce*. The Administrator is directed to exercise and perform his powers and duties under the Act in such manner as 'will best tend to reduce or eliminate the *possibility* [emphasis by the Court] of, or recurrence of, accidents in air transportation.' 49 U.S.C.A. §1421(b)" (emphasis added).
>
> *Air Line Pilots Ass'n. v. Quesada*, 182 F. Supp. 595, 598 (S.D. N. Y.), aff'd., 276 F. 2d 892 (2nd Cir. 1960)

Although the Federal Aviation Agency has authorized operation of all twin jet aircraft in question with two men and has directed that any additional crewman shall not be assigned any duties other than monitoring the company radio, the Union argues that it is *free to bargain* for more stringent safety policies than are provided for by that Agency. That may well be true, but the point is that the Union *refused* to bargain on the subject — and its *right* to bargain in no way excuses its *refusing* to do so.

A primary defense of the Union is its claim that the procedures of the Act were "fully exhausted" by its attendance at bargaining sessions with Piedmont, notwithstanding its flat refusal to consider any alternative to its mandatory policy during these meetings. It is elementary, of course, that perfunctory gestures do not fulfill the good-faith bargaining requirements of the Act.

> "To effectuate the purposes of the [Railway Labor] Act and to prevent a mockery of its requirements such efforts [to resolve the dispute] must be reasonable and made in good faith and not simply to satisfy perfunctory compliance."
>
> *Long Island R. R. v. Brotherhood of R. R. Trainmen,* 185 F. Supp. 356, 358 (E.D. N.Y. 1960)

"If compliance with the [Railway Labor] Act need only be perfunctory, the congressional man-

date would be defeated and the purposes of the Act rendered nugatory."

Pan American World Airways, Inc. v. Brotherhood of Ry. and S. S. Clerks, 185 F. Supp. 350, 353 (E.D. N.Y. 1960)

Legions of cases have consistently held this to be true even under the less demanding bargaining requirements of the National Labor Relations Act.

"The bargaining required by the Act does not mean mere talk with the purpose of avoiding agreement, but a good faith effort to reach agreement. . . ."

National Labor Relations Board v. Darlington Veneer Co., 236 F. 2d 85, 88 (4th Cir. 1956)

"[T]he duty to bargain in good faith is not satisfied by merely meeting with union representatives to inform them that the employer cannot or will not change its position."

National Labor Relations Board v. Israel Putnam Mills, 197 F. 2d 116, 117 (2nd Cir. 1952)

"Collective bargaining means something more than mere talk by those who have decided in advance not to bargain at all with respect to so vital a matter as the rate of wages and to reserve to

themselves the right to control same by unilateral action."

National Labor Relations Board v. Berkley Machine Works & Foundry Co., 189 F. 2d 904, 907 (4th Cir. 1951)

"The Board's position is that an employer who insists upon reserving the right to act unilaterally and of its own will alone upon matters involving legitimate collective bargaining and denies the employees any contractual provision for opportunity to bargain collectively with regard thereto thereby refuses to bargain collectively within the meaning of the Act."

Singer Mfg. Co. v. National Labor Relations Board, 119 F. 2d 131, 136 (7th Cir. 1941)

"Applying the rule here, we think the circumstances of this case support the Board's finding that the employer, while freely conferring, did not approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties."

Majure v. National Labor Relations Board, 198 F. 2d 735, 739 (5th Cir. 1952)

Finally, it is argued by the Union that the Norris-LaGuardia Act has placed the Union beyond the reach of the courts. Such argument has been refuted completely and repeatedly in court precedents.

"We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

. . .

"[T]he specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act.

" 'Our conclusion is that the *District Court has jurisdiction and power to issue necessary injunctive relief orders* [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act' " (brackets are the Court's, emphasis added).

Brotherhood of R. R. Trainmen v. Chicago River & Indiana R.R., 353 U. S. 30, 40, 42 (1957)

These principles were reconfirmed in *Order of R. R. Telegraphers v. Chicago and North Western R. R.*, 362 U. S. 330 (1960), where the Court stated:

"[A] strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act 'adopted as a part of a pattern of labor legislation.' "

Order of R. R. Telegraphers v. Chicago and North Western R. R., supra, at 339

Cases from the courts of appeals have followed and amplified the pronouncements of this Court dealling with the subject of accommodation of these two Acts.

"That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act. . . . That is the conclusion of other courts which have considered the matter, and we agree. The point is, simply that *Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations*. That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives" (footnotes omitted, emphasis added).

Brotherhood of R. R. Trainmen v. Akron & Barberton Belt R. R., 385 F. 2d 581, 613-614 (D.C. Cir. 1967), cert. den., 390 U. S. 923 (1968)

"It is not here disputed that Norris-La Guardia Act will not apply to preclude injunctive relief in cases in which the acts to be enjoined are in violation of the Railway Labor Act. . . . Whether or not any provision of the Railway Labor Act had been violated by either or both of the opposing

parties, was and is precisely the subject of the consolidated merits case. . . . Certainly, as noted, if the strike was so illegal, Norris-La Guardia Act would not apply to deprive the District Court of jurisdiction to enjoin it" (footnotes omitted).

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. R., 380 F. 2d 570, 583 (D.C. Cir. 1967)

"It is well settled that injunctive relief may be granted to vindicate the processes of the [Railway Labor] Act regardless of the provisions of the Norris-La Guardia Act."

Pan American World Airways, Inc. v. International Brotherhood of Teamsters, 275 F. Supp. 986, 999 (S.D. N.Y. 1967), affirmed on the basis of the opinion below sub. nom., *Brotherhood of Ry. Clerks v. Pan American World Airways, Inc.*, 404 F. 2d 938 (2nd Cir. 1969)

Accord: *Pennsylvania R. R. v. Transport Workers Union*, 191 F. Supp. 915, 921 (E. D. Pa.), aff'd., 280 F. 2d 343 (3rd Cir. 1960); *Chicago, Burlington & Quincy R. R. v. Railway Employes' Dept.*, — F. Supp. —, 60 LC ¶10, 071 (D.D.C. 1969); *Western Air Lines, Inc. v. Flight Engineers Int'l. Ass'n.*, 194 F. Supp. 908, 910-911 (S. D. Cal. 1961). See also, *Norfolk & Portsmouth Belt Line R. R. v. Brotherhood of R. R. Train-*

men, 248 F. 2d 34, 45-46 (4th Cir. 1957); *Southern Ry. v. Brotherhood of Locomotive Firemen and Enginemen*, 223 F. Supp. 296, 305 (M. D. Ga. 1962), aff'd., 324 F. 2d 503 (5th Cir. 1963); *Pennsylvania R. R. v. Transport Workers Union*, 202 F. Supp. 134, 137 (E. D. Pa. 1962); *American Airlines, Inc. v. Air Line Pilots Ass'n.*, 169 F. Supp. 777, 783-789 (S. D. N. Y. 1958); and *American Airlines, Inc. v. Transport Workers Union*, 202 F. Supp. 806, 810-811 (S. D. N. Y. 1962).

The Union argues that the decision here is inconsistent with *Brotherhood of R. R. Trainmen v. Toledo, Peoria & Western R. R.*, 321 U. S. 50 (1944), where, applying the equitable doctrine of "clean hands," an injunction was denied because the carrier had rejected arbitration proferred by the National Mediation Board and accepted by the union. But there is here no such inconsistency with that ruling. In the *Toledo* case, it was admitted on all sides that all of the procedures of the Railway Labor Act had been fully exhausted by the parties acting in good faith. That the *Toledo* holding has no application here is further shown by the holdings in the *Akron & Barberton Belt R. R.* cases, *supra*.

> ". . . [L]ack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that

the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act."

Brotherhood of R. R. Trainmen v. Akron & Barberton Belt R. R., supra, at 614

In the injunctive order in the case at bar, the District Court detailed a number of ways in which the general public was suffering, and would continue to suffer, "irreparable injury and damage" if the strike were not enjoined (Pet. App., pp. 3b-4b). Indeed, in *Chicago, Burlington & Quincy R. R. v. Railway Employes' Dept.*, — F. Supp. —, 60 LC ¶10, 071 (D. D. C. 1969), the Court held that public interest required that the strike be enjoined at the behest of the carrier, notwithstanding that it was found as a fact that such carrier had bargained in bad faith. But in the present case, there is not even any contention that Piedmont failed to bargain in good faith.

CONCLUSION

Upon the basis of all the foregoing, the Respondent, Piedmont Aviation, Inc., urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPT FROM PAGE 108 OF TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA ON AUGUST 13-14, 1969

(P. 108)

THE COURT: Both of you come up here—I'm inclined to — if I can get the public some relief about this thing — I can understand their position, you know, and I'm inclined to do something by way of some injunctive relief. Isn't there some way we can resolve this matter so that we can let the matter come on for hearing on its merits? We are not behind in this district like they are in some other districts, and I would be willing to expedite the hearing on the record and get the matter heard on its merits as soon as possible. Isn't there something we could agree on and resolve this thing?

EXCERPTS FROM PAGES 3 AND 18 OF TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ON JULY 16, 1969

(P. 3)

Basically, aside from the Railway Labor Act statutory overtones, we have here a suit based upon breach of contract. The pilots claim that they have an existing agreement with Piedmont which requires the carrier to continue with the three pilot crew complement on B-737 aircraft for the duration of the present collective bargaining agreement.

The Pilots assert that this three-pilot crew is required by virtue of a decision in an arbitration between ALPA and United Air Lines which Piedmont and ALPA agreed to abide by in their agreement.

(P. 18)

A preliminary injunction is necessary to preserve the status quo until a final decision can be made. The choice would seem to be unilateral action by Piedmont with a response by the Pilots or an orderly process by which the parties determine their respective obligations under the agreement, and then go forward.

The pilots have opted at this time for a preliminary injunction to preserve the status quo so that each side will be fully aware of its legal obligations and will be able to carry them out before any economic action or economic battle ensues on the airline.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 995

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

—against—

PIEDMONT AVIATION, INC.,
Respondent.

MOTION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR LEAVE TO FILE OUT OF TIME PETITION FOR REHEARING

—and—

PETITION FOR REHEARING OF ORDER DENYING A WRIT OF CERTIORARI

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Respondent.

MOTION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR LEAVE TO FILE OUT OF TIME PETITION FOR REHEARING

Air Line Pilots Association, International ("ALPA") respectfully moves for leave to file out of time the annexed petition for rehearing of the denial of a Writ of Certiorari in the above-entitled case, pursuant to Rule 35 of the Supreme Court Rules.

ALPA's motion for leave to file out of time is based upon the following considerations:

1. On December 26, 1969, ALPA petitioned this Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. On February 24, 1970, this Court entered the following order:

> "The petition for a Writ of Certiorari is denied. Mr. Justice Black and Mr. Justice White are of the opinion that Certiorari should be granted."

2. On or about March 27, 1970, in reviewing weekly Labor Law Reports issued by Commerce Clearing House, my office first became aware of a decision of the Court of Appeals for the Seventh Circuit, dated March 6, 1970, in *Chicago and North Western Railway Co.* v. *United Transportation Union,* not yet officially reported, unofficially reported at 62 CCH Lab. Cas. ¶10,721 and 73 LRRM 2694. This decision is in direct conflict with the Fourth Circuit decision presented for review by ALPA in this case. As stated by the Seventh Circuit:

"We cannot agree with the Fourth Circuit decision."

It is apparent from the annexed petition for rehearing that the Seventh Circuit decision is an intervening circumstance of substantial effect.

3. After learning of the Seventh Circuit decision, my office reviewed ALPA's petition for a Writ of Certiorari in light of this development, consulted with ALPA on petitioning this Court for a rehearing of its February 24, 1970 order, prepared the annexed petition, and arranged for printing of both this motion and the annexed petition for rehearing, all of which have taken time beyond those limits prescribed by Rule 58 of the Rules of this Court.*

4. This motion and petition for rehearing are filed in the interest of an expeditious processing of the present litigation, which comes to this Court for review of a preliminary injunction order. That injunction applies restraints which are equivalent to permanent injunctive restraints insofar as petitioner's rights are concerned.

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* Since the order denying a Writ of Certiorari was issued February 24, the period for a petition for rehearing within the time limits of Rule 58 expired on March 21, 1970.

5. With a direct conflict between the Fourth and Seventh Circuits on an issue crucial to the jurisdiction of the federal Courts in this case, only the Supreme Court can establish a uniform national standard for purposes of application of the Railway Labor Act and Norris-LaGuardia Act to this and similar situations.

For the foregoing reasons, ALPA respectfully urges that the Court grant its motion for leave to file out of time and consider the annexed petition for rehearing.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969

No. 995

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—against—

PIEDMONT AVIATION, INC.,

Respondent.

PETITION OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Air Line Pilots Association, International ("ALPA") respectfully prays that the Court rehear its order denying ALPA's petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and issue a Writ of Certiorari to review the judgment of the Fourth Circuit entered in this action on September 29, 1969. The Fourth Circuit opinion is officially reported at 416 F.2d 663 (4th Cir. 1969) and is set forth in Appendix A to ALPA's petition for a Writ of Certiorari (which is deemed incorporated herein).

ALPA's petition for a Writ of Certiorari was filed on December 26, 1969. On February 24, 1970, the Court denied ALPA's petition. Mr. Justice Black and Mr. Justice White were of the opinion that certiorari should have been granted.

On March 6, 1970, the Seventh Circuit handed down a decision in *Chicago and North Western Railway Co.* v. *United Transportation Union* (Appeals 18109 and 18145), not yet officially reported, which is in direct conflict with the Fourth Circuit decision herein. The Seventh Circuit's opinion appears unofficially at 62 CCH Lab. Cas. ¶ 10,721 and 73 LRRM 2694. It is clearly an important intervening circumstance of substantial effect.

Fourth Circuit Decision in this Litigation

In its decision, the Fourth Circuit affirmed issuance under the Railway Labor Act ("RLA") and Norris-LaGuardia Act of a preliminary injunction against a peaceful strike of airline pilots called after exhaustion of all RLA "major dispute" collective bargaining procedures and in response to a company lockout. Each of the three issues presented by ALPA's petition for a Writ of Certiorari centered upon federal Court jurisdiction to grant injunctive relief against a strike *after* exhaustion of all RLA "major dispute" procedures.

The Fourth Circuit did not question the undisputed fact that ALPA and Piedmont had actually exhausted the RLA "major dispute" procedures, including negotiations, mediation, an arbitration proffer (rejected by Piedmont), and expiration of the thirty-day "cooling off" period established by RLA Section 5, First. 416 F.2d at 635, 636. Paradoxically, however, the Court concluded that, even after exhaustion of RLA procedures, the issue of whether the parties had negotiated in good faith in pursuing the "major dispute" presented a justiciable question involving accommodation of the RLA with the Norris-LaGuardia Act. Accordingly, the Fourth Circuit held that the Norris-LaGuardia Act did not

preclude issuance of the injunction foreclosing self-help by the pilots after exhaustion of RLA procedures. 416 F.2d at 636.

Seventh Circuit Case

In *Chicago and North Western Railway Co.* v. *United Transportation Union, supra,* the Seventh Circuit ruled upon an identical situation.

As in the Piedmont-ALPA case, the underlying collective bargaining issue in *Chicago and North Western Railway* concerned crew consist, the specific question being the number of brakemen in freight and yard crews.* As in this action, the carrier and union in *Chicago and North Western Railway* engaged in RLA Section 6 negotiations, participated in mediation under the aegis of the National Mediation Board, were the subject of an arbitration proffer, and maintained the "status quo" for the thirty day "cooling off" period. And, as here, the carrier in *Chicago and North Western Railway* sought in the federal district Court a preliminary injunction enjoining a strike, based upon carrier charges of union failure to bargain in good faith while subject to the RLA "major dispute" procedures.**

Direct Conflict between Fourth and Seventh Circuits

The Seventh Circuit, faced with the same issue as the Fourth Circuit in the Piedmont-ALPA dispute, reached a

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* The underlying bargaining controversy in this case was the question of pilot crew complement on B-737 jet aircraft.

** While the strike injunction litigation here was commenced after Piedmont's lockout of the B-737 Second Officer and responding pilot strike, the action in *Chicago and North Western Railway* was started before a strike was called. This, however, is not a significant distinction.

decision directly to the contrary. The Seventh Circuit held that exhaustion of RLA "major dispute" procedures rendered "non-justiciable" the carrier charge that the union had failed to bargain in good faith, stating in part:

> "Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because §2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-La Guardia Act. In addition, a judicial enforcement of §2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no machinery nor guidelines in the Act which would aid the court in making this difficult determination." 62 CCH Lab. Cas. at 18,379.
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> "While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual question of intent while unreasonably postponing the parties' right to self-help." 62 CCH Lab. Cas. at 18,380.

Plainly stating disagreement with the Fourth Circuit, Judge Kerner wrote:

> "* * * the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l* [61 LC ¶10,373] 416 F.2d 633 (4th Cir. 1969) (petition for cert. filed, 38 U. S. L. W. 3241, Jan. 6, 1970, No. 995), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:
>
> > Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes, without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.
>
> and thus held §2, First, to be justiciable. *We cannot agree with the Fourth Circuit decision.* The machinery to prevent strikes which was the Congressional purpose in enacting the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference." (Emphasis added). 62 CCH Lab. Cas. at 18,380.

The Seventh Circuit decision creates a classic conflict between the Circuits.*

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* The conflict between Circuits is also apparent from Piedmont's brief in opposition to ALPA's petition for a Writ of Certiorari, where Piedmont stated: "The central, all-pervading and ultimately determinative question in this case is whether the Union fulfilled its collective bargaining obligations under Section 2 First and Second of the Railway Labor Act, 45 U.S.C. §152 First and Second, and thereby exhausted all remedies therein provided, before it took strike action against Piedmont." (Brief, pp. 9-10). Such a determination, Piedmont maintained, must be made by the judiciary.

Need for Uniform Federal Labor Law Under the RLA

With opposing Seventh and Fourth Circuit decisions, there is now no national standard for injunctive relief in RLA "major disputes." This is particularly disturbing for railroad and airline employees, whose companies traditionally do business over large geographical areas and whose federal collective bargaining rights should not be permitted to depend on the federal Court forum chosen for litigation.

The questions presented are ones which are particularly suitable for resolution by the Supreme Court and can indeed be finally decided on a uniform national basis only by this Court.

CONCLUSION

The Seventh Circuit decision in *Chicago and North Western Railway Co.* v. *United Transportation Union* is an intervening circumstance of substantial effect. It presents for determinatiton by this Court a classic conflict between the Circuits.

For these reasons, and those previously shown, it is respectfully urged that the Supreme Court issue a Writ of Certiorari upon rehearing to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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